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Sup. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 190

ZACHARY BOZZA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

No. 190

Office - Supreme Court, U. S.
FILED
JUN 15 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

UNITED STATES OF AMERICA,

vs.

ZACHARY BOZZA, also known as JOHN BOZZA,
Defendant-Appellant.

ON APPEAL FROM CRIMINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

APPENDIX TO APPELLANT'S BRIEF AND PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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APPENDIX.

Docket Entries.

1945		
Mar.	21	Indictment for engaging in business of distiller; possessing unregistered still; fermenting mash; concealing untax-paid distilled spirits; transporting distilled spirits without Int. Rev. Stamps affixed, filed.
"	21	Peter Milito—Ordered bench warrant issue. (M)
"	21	Peter Milito—Bench warrant issued.
"	21	Notice of Allocation, filed. (Newark)
"	26	Nicholas Chirichillo—Plea—Not Guilty. Ordered bail continued. (M)
"	26	Zachary Bozza—Plea—Not Guilty. Ordered bail continued. (M)
"	26	Peter Milito—Plea—Not Guilty. Ordered bail fixed at $1,000.00. (M)
"	31	Peter Milito—Bench warrant returned, unexecuted, filed.
Apr.	6	Ellen Vettor—Ordered motion to parole deft. in custody of Miss Sanders of the Family Service, Jersey City, N. J., granted. (M)
"	10	Petition for payment of witness fees to Ellen Vettor, filed.
"	10	Order for payment of witness fees to Ellen Vettor, filed. (M)
June	29	Order vacating order to pay witness fees to Ellen Vettor, filed. (M)
July	12	Bill of Particulars, filed.
"	16	Ellen Vettor—Order to transport, filed. (S)
"	17	Ordered motion for severance as to Ellen Vettor, granted. (M)
"	17	Trial before the Hon. Thomas F. Meaney, Judge and Jury, as to the defts., Nicholas Chirichillo, Zachary Bozza and Peter Milito.

Docket Entries.

1945		
"	17	Ordered motion to dismiss count 6 as to all defendants, granted. (M)
"	17	Trial adjourned until July 18, 1945 at 10:30 A. M.
"	18	Trial continued.
		Motion for a directed verdict of acquittal as to Milito on Cts. 1, 2, 3, 4 & 5. Decision reserved.
"	18	Ordered motion for directed verdict of Not Guilty on Counts 1, 2, 3, 4 & 5 as to defts. Nicholas Chirichillo & Zachary Bozza, denied.
		Verdict:
		Peter Milito—Not Guilty on Counts 1, 2, 3, 4 & 5.
		Nicholas Chirichillo—Guilty on Counts 1, 2, 3, 4 & 5.
		Zachary Bozza—Guilty on Counts 1, 2, 3, 4 & 5.
		Ordered bail continued as to Bozza and Chirichillo.
		Ordered Peter Milito discharged from custody. (M)
		Ordered sentence deferred until July 23, 1945.
"	19	Ellen Vettor—Copy of order to transport with Marshal's return thereon, filed.
"	23	Nicholas Chirichillo—Sentence—Two years and fine of $100.00 on Ct. 1; Two years and fine of $100.00 and penalty of $500.00 on Ct. 2; Two years and fine of $500.00 on Ct. 3; and Two years and six months on each of Cts. 4 & 5. Prison sentence on Cts. 1, 2, 3, 4 and 5 to run concurrently.
"	23	Zachary Bozza—Sentence—Two years and fine of $100.00 on Ct. 1; Two years and fine of $100.00 and a penalty of $500.00 on Ct. 2; Two years and fine of $500.00 on Ct. 3; and Two years and six months on each of Cts. 4 & 5.

Docket Entries.

1945		
		Prison sentence on Cts. 1, 2, 3, 4 & 5 to run concurrently. (*Note:* Prison sentence was imposed on the morning of 7-23-45, and then in the afternoon of 7-23-45, the minimum mandatory fines and penalties were imposed.)
		Ordered motion to fix bail pending appeal, denied. (M)
"	23	Nicholas Chirichillo—Judgment and commitment, filed.
"	23	Zachary Bozza—Judgment and commitment, filed.
"	23	Zachary Bozza—Notice of Appeal, filed. (Copy sent to USCCA)
"	30	Ellen Vettor—Ordered remanded to jail. (S)
Aug.	6	Nicholas Chirichillo—Copy of Judgment and commitment with Marshal's return thereon, filed.
"	9	Zachary Bozza—Certified copy of Order allowing appellant on bail pending appeal of U. S. C. C. A., filed.
"	13	Ordered motion for the release of certain exhibits, granted. Consent order submitted. (Fk)
"	13	Consent order for release for certain exhibits, filed. (Fk)
"	13	Ellen Vettor—Ordered motion for the release of deft., adjourned to Aug. 14, 1945 at 11:30 A. M. (Fk)
"	13	Ellen Vettor—Ordered remanded to jail. (Fk)
"	13	Zachary Bozza—Petition for order extending time to file record on appeal, filed.
"	13	Zachary Bozza—Order extending time to file record on appeal to Oct. 4, 1945, filed. (Fk)
"	20	Ellen Vettor—Plea—Not Guilty. (Fk)
"	20	Ellen Vettor—Retracted plea of not guilty and pleaded guilty. (Fk)

Docket Entries.

1945		
"	20	Ellen Vettor—Sentence: One year and one day and fine of $100.00 on Count 1; one year and one day and fine of $100.00 and a penalty of $500.00 on Count 2; one year and one day and fine of $500.00 on Count 3; one year and one day on Count 4. Ordered payment of fines and penalties, suspended. Prison sentence on Counts 1, 2, 3 and 4 to run concurrently. (Fk)
"	20	Ellen Vettor—Judgment and commitment, filed. (Fk)
"	20	Ellen Vettor—Transcript of plea and sentence, filed. (Fk)
Sept.	5	Ellen Vettor—Copy of Judgment and commitment with Marshal's return thereon, filed.
Oct.	23	Zachary Bozza—Notice of motion to settle and allow bill of exceptions and for order requiring Clerk to correct minutes and docket, etc., and acknowledgment of service, filed.
"	29	Ordered motion to settle and allow bill of exceptions, as to Zachary Bozza, granted. (M)
"	29	Zachary Bozza—Ordered motion to correct minutes and docket so that they will correctly show the proceedings touching upon the Court's imposition of sentence upon the deft. on July 23, 1945, granted. (M) Order to be submitted.
Nov.	1	Assignment of Errors and acknowledgment of service, filed.
"	1	Bill of Exceptions, filed.
"	2	Order for correction of Clerk's minutes and docket re imposition of sentence on Zachary Bozza, filed. (M)

Indictment.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

In the District Court of the United States of America in and for the District of New Jersey, at the November Term thereof, Second Panel, in the year 1944.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present:

That on or about the 19th day of January, 1945, at Woodbridge Township, in the County of Middlesex, State and District of New Jersey and within the jurisdiction of this Court,

NICHOLAS CHIRICHILLO, also known as
Franzisco Basillo

ELLEN VETTOR

ZACHARY BOZZA, also known as
John Bozza

PETER MILITO

whose true and correct names other than as herein stated are to the Grand Jurors unknown and hereinafter called the defendants, did wilfully, unlawfully and feloniously engage in and carry on the business of distiller, and did then and there make and distill a quantity, to wit, 2½ proof gallons of spirits and then and there subject to the tax imposed by the Revenue Laws of the United States, with intent wilfully to defraud the said United States of the tax on the said spirits so distilled by the said defendants; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States, Title 26 Int. Rev. Code, Sec. 2833a.

Indictment.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present,

That on or about the 19th day of January, 1945, at Woodbridge Township, in the County of Middlesex, State and District of New Jersey and within the jurisdiction of this Court, the said

NICHOLAS CHIRICHILLO, also known as
Franzisco Basillo
ELLEN VETTOR
ZACHARY BOZZA, also known as
John Bozza
PETER MILITO

hereinafter called the defendants, did wilfully, unlawfully and feloniously have in their possession and custody and under their control a certain still set up, and did fail and neglect to register the same with the District Supervisor of the Alcohol Tax Unit, in the Bureau of Internal Revenue for the Fourth District of the United States, by subscribing and filing with the said District Supervisor, immediately upon the said still being set up, or at any time thereafter, statements, in writing, in the number required by law, setting forth the particular place where the said still was set up, the kind of still so set up, the cubic contents thereof, the owner or owners thereof, his or their place or places of residence, and the purpose for which the said still had been or was intended to be used, and that said still consisted of a continuous process still of about 282 gallons daily capacity, together with all other necessary attachments and adjustments thereto pertaining, necessary and essential for the operation thereof, and which said still was then and there capable of and was intended and designed on the part of the said defendants for the unlwaful production of distilled spirits for beverage and commercial purposes;

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said defendants knowingly, wilfully and feloniously did have in their possession and custody and under their control, a still set up which was not then and there registered as required by law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Title 26 Int. Rev. Code, Sec. 2810a.

THIRD COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present,

That on or about the 19th day of January, 1945, at Woodbridge Township, in the County of Middlesex, State and District of New Jersey and within the jurisdiction of this Court, the said

NICHOLAS CHIRICHILLO, also known as
Franzisco Basillo
ELLEN VETTOR
ZACHARY BOZZA, also known as
John Bozza
PETER MILITO

did wilfully, unlawfully and feloniously make and ferment about 600 gallons of a certain mash fit for and intended for distillation and for the production of spirits or alcohol, in a certain building not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Title 26 Int. Rev. Code, Sec. 2834.

FOURTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present,

That on or about the 19th day of January, 1945, at Woodbridge Township, in the County of Middlesex, State and

District of New Jersey and within the jurisdiction of this Court, the said

NICHOLAS CHIRICHILLO, also known as
Franzisco Basillo
ELLEN VETTOR
ZACHARY BOZZA, also known as
John Bozza
PETER MILITO

hereinafter called the defendants, did wilfully, knowingly and feloniously conceal and were concerned in the concealing of a certain commodity, to wit, about 2½ gallons of distilled spirits, for and in respect whereof a tax had been imposed by the provisions of the Internal Revenue Laws of the United States and which said tax had not been paid, with intent in the said defendants to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Title 26 Int. Rev. Code, Sec. 3321a.

FIFTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present,

That on or about the 7th day of January, 1945, in the Township of Woodbridge, in the County of Middlesex, State and District of New Jersey and within the jurisdiction of this Court, the said

NICHOLAS CHIRICHILLO, also known as
Franzisco Basillo
ZACHARY BOZZA, also known as
John Bozza

hereinafter called the defendants, did wilfully, knowingly, unlawfully and feloniously transport and were concerned in the transportation of a certain commodity, to wit, 35 gallons of distilled spirits, for and in respect whereof a tax

had been imposed by the provisions of the Internal Revenue Laws of the United States which said tax had not been paid, nor did the containers thereof have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such distilled spirits, with the intent in the said defendants to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Title 26 Int. Rev. Code, Sec. 2803.

SIXTH COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present,

That on or about the 15th day of December, 1944, in the Township of Woodbridge, in the County of Middlesex, State and District of New Jersey and within the jurisdiction of this Court, the said

PETER MILITO

hereinafter called the defendant, did wilfully, knowingly, unlawfully and feloniously transport and was concerned in the transportation of a certain commodity, to wit, 40 gallons of distilled spirits, for and in respect whereof a tax had been imposed by the provisions of the Internal Revenue Laws of the United States and which said tax had not been paid, nor did the containers thereof have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such distilled spirits, with the intent in the said defendant to defraud the United States of such tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Title 26 Int. Rev. Code, Sec. 2803.

THORN LORD,
United States Attorney.

Testimony.

(Page 102)

* * * * * *

ELLEN VETTOR, called and sworn on behalf of the Government, testifies as follows:

Direct examination by Mr. Tyne:

Q. Mrs. Vettor, you are presently confined—I mean not at the present moment, but you have been confined to the Hudson County Jail, have you not? A. That's right.

Q. And you have been connected with these other defendants in connection with the operations carried on at the Cleveland Street address in Woodbridge Township, isn't that so? A. That's right.

(Page 103) Q. You have been divorced? A. No, I am not divorced.

Q. Do you know Nicholas Chirichillo? A. Yes, I do.

Q. And when did you first meet him, about what time? A. Around March.

Q. March of 1944? A. Yes.

Q. And did you reside with him as his housekeeper? A. I did.

Q. Where? A. 213 Center Street, Elizabeth, New Jersey.

Q. Can you identify Nicholas Chirichillo? A. Yes.

Q. Will you point him out—the man in the brown suit at the end? A. Yes.

Mr. Tyne: Identifying the defendant Nicholas Chirichillo.

Q. You resided with him there at 213 Center Street, Elizabeth, during 1944? A. That is correct.

Q. On or about October 1 or 15, was any move made of transferring, either partially or wholly, your living time elsewhere? A. Yes, there was.

Q. Where did you go? A. We went out to the farm that has been already mentioned.

Mr. Simandl: We cannot hear, if the Court please.

The Court: Try to speak up so that everybody can hear you.

Q. Will you speak up? A. We went out to the farm located on Cleveland Avenue and Inman.

(Page 104) Q. That is in Woodbridge Township? A. That is correct.

The Court: Is that the place you mean?

The Witness: That is right.

The Court: I refer now to G-3 in evidence; is that it?

The Witness: Yes, that is correct.

Q. Did you go to the home of Mrs. Colacarro to rent the premises? A. I did.

Q. With whom? A. With Mr. Chirichillo.

Q. And do you know whether or not he paid any money to Mrs. Colacarro for the rental of the premises? A. I don't believe he paid it on that day I went there.

Q. Did he pay subsequent to that time? A. Yes, he did.

Q. When did you first go into this farm which you have identified on this photograph, the farmhouse on the photograph; about when? A. October.

Q. And when you went into the house did you transfer any furnishings there? A. Just the studio couch belonging to Mr. Chirichillo's apartment.

Q. Now, before you went into the house did Mr. Chirichillo make known to you his intentions concerning the use of this farmhouse?

Mr. Simandl: I object to that, if the Court please, (Page 105) for the defendant Bozza, certainly it is not binding on him.

The Court: What?

Mr. Simandl: She was asked the question as to whether Mr. Chirichillo made known to her his intention as to what he was going to do there, and I submit, if the Court please, that any conversation between Chirichillo and this witness is certainly not binding——

The Court: I conceive it would be binding on Chirichillo.

Mr. Simandl: Yes, your Honor, I am not objecting on his behalf.

The Court: I will take care of that.

Mr. Cassini: May it please your Honor, I have an objection to make to this as to the intention that Chirichillo had.

The Court: Well, if you have any conversation——

Mr. Cassini: I object to the question, to the form of the question because it is leading. If the question is going to be asked it should be asked so that it is not a leading question.

The Court: Did you have any conversation with Mr. Chirichillo at the time that you transferred the studio couch to the new place?

The Witness: Referring to what?

(Page 106) The Court: Well, anything about the new place; did you have any conversation with him about the new place?

The Witness: He said he was going to rent his old farmhouse and he said a trip in the country would do you some good. My nerves. So I just went into the matter fully.

The Court: Did you have any other discussion with him at any time about the place?

Mr. Simandl: Will your Honor instruct the jury that any conversation——

The Court: I will take care of that. Now, you don't have to repeat that all the time, I have said

once and that's all that need be said, I will take care of it at the proper time. You know perfectly well that you can make any requests to charge if you ever get that far.

Mr. Simandl: I just don't want to have it appear that I was not objecting.

The Court: I know, you are between the devil and the deep sea. You don't want it to appear that you are failing to object properly or you don't want to annoy me by objecting too much.

Mr. Simandl: That's right.

The Court: All right, we will take it for granted (Page 107) that you have objected to this testimony so far as your client is concerned and Mr. Ratner is objecting so far as his client is concerned, and I have stated that any conversation between this witness and Chirichillo will be admissible against Chirichillo only. Now, was there any discussion about this place or the use to which it was to be put?

The Witness: He told me he was going to make alcohol, make liquor.

Q. When you moved into the place were you there during the day? A. Yes, I was there during the day.

Q. Did you see any operations carried on from the time you went in up until some subsequent time? A. I saw stuff being carried into the house.

Q. What was being carried into the house? A. The parts for the cooker and also this——

The Court: Did you see who carried them in?

The Witness: See who carried them in?

The Court: Yes.

The Witness: Well no. Not just one party carried them.

The Court: How many people carried them in?

The Witness: Three of them, they took turns.

The Court: Who were they? Do you see them in court?

(Page 108) The Witness: Nick and another party I do not see in court.

The Court: Who is Nick?

The Witness: Nick Chirichillo.

The Court: And do you know who the other two were?

The Witness: The other party is not in court.

Q. What was his name? A. Dominick.

Mr. Tyne: Dominick is not in court, we will concede that.

Q. Who else? A. I am a little bit muddled up now.

The Court: Take your time; there is Nick and Dominick and a third man?

The Witness: I forget the other.

The Court: All right, go ahead. Did you ever see anybody in there at any other time?

The Witness: What do you mean?

The Court: At the still, any time at all.

The Witness: Ever see anybody else, no.

Q. You went to the farmhouse in October and you remained there substantially all the time up until what date about? A. Up to the day I went to the hospital.

Q. And when was that? A. In January.

Q. What part of January? Let me ask you this. You accompanied one of the agents to the farmhouse, didn't you? A. Yes, I did.

(Page 109) Q. Pointed it out to them? A. Yes, I did.

Q. And during the time, going back to the time when all this material was being brought in here, did you see anything being manufactured? A. Yes.

Q. What was being manufactured? A. The alcohol. Sugar was being brought in.

The Court: Who was manufacturing it?

The Witness: Mr. Chirichillo.

The Court: Anybody else?

The Witness: Dominick helped out and Jack.

Mr. Cassini: I can't hear that.

The Court: Dominick helped out and also Jack.

Q. Now, who is Jack? A. Jack Bozza.

Q. Jack Bozza. Do you see him in court here today? A. Yes, I do.

Q. Will you point him out. A. The gentleman with the reddish tie.

Q. The gentleman sitting at the end? A. Yes.

Mr. Tyne: Identifying John Bozza.

Q. How long did it take to get the still erected, about? A. Several weeks.

Q. And during that time who worked on the construction of the still? A. Who worked on it?

Q. Yes. A. Nicholas Chirichillo.

Q. And who else? I don't mean to confine myself merely (Page 110) to the actual putting it up, but who did anything toward bringing in the material and putting it up?

The Court: You said Nicholas and Dominick and a third man brought the stuff in?

The Witness: Yes.

The Court: Who was the third man, do you remember what his name was?

The Witness: No, I couldn't remember.

The Court: Was there anybody else who brought stuff in there?

The Witness: I don't get the exact question.

The Court: Well, was there anybody else? You said there were three men brought the parts of the still. Now, did anybody else bring in sugar or anything else?

The Witness: Nick brought the sugar.

The Court: Nick brought the sugar. Then you say that in the making of the alcohol there was Nick and Dominick and Bozza, is that right?

The Witness: Yes.

The Court: Was there anybody else that you recall?

The Witness: No.

Q. I show you these photographs that have been offered in evidence of the interior of the house and ask you if you recognize what is portrayed on G-8, what does (Page 111) that show? A. The cooker.

Q. Where was that? A. That was on the second floor.

Q. And I show you G-6 and ask you what room that is? A. That is what I term the living room.

Q. On what floor? A. On the ground floor.

Q. And I show you G-5 in evidence and ask you what that room is? A. That is the dining room, also the living room.

Q. Dining room and living quarters. I show you G-7 and ask you what that picture shows? A. Those are the steps that you go up into the attic, center hallway I call it, big rooms off of it.

Q. I show you this photograph here, G-4, and ask you what that portrays? A. That is the attic.

Q. Now, did you ever see any materials in these tanks in the attic? A. I saw the sugar being dumped into them.

Q. By whom? A. Nicholas Chirichillo.

Q. And who else? A. No one.

Q. And did you see any fermentation taking place?

Mr. Simandl: Oh, I object.

Mr. Tyne: Withdraw the question.

Q. Did you see any of the finished product? A. Yes.

Q. That came from the still? A. Yes, I saw it.

Q. Did you have any of it yourself? A. Yes, I tasted it.

The Court: Did you ever see it taken out of there?

(Page 112) The Witness: You mean out of the——

The Court: Out of the place.

The Witness: I have seen the cans.

The Court: Who took them out?

The Witness: They were put out through the kitchen window.

The Court: By whom?

The Witness: By Chirichillo.

The Court: Anybody else?

The Witness: No.

The Court: And who carted them away?

The Witness: Some of it, it was conveyed in the Ford.

Mr. Cassini: I don't hear that.

The Witness: It was conveyed in the Ford sedan by Mr. Chirichillo.

The Court: And the rest of it?

The Witness: The rest, the——

Q. Are you confused, Mrs. Vettor?

Mr. Simandl: Well, now, wait a minute; the witness hasn't indicated any confusion, I don't think it is fair to suggest that she is.

The Court: Take your time. How was the rest taken out?

The Witness: The rest was taken out in this truck (Page 113) as we called it.

The Court: Whose truck?

The Witness: The one that belonged to Pete Milito.

The Court: And was Milito driving the truck?

The Witness: Yes.

Q. Now, you said that the cans of alcohol were taken out of the kitchen window? A. Yes.

Q. How did they get out of the kitchen window? A. Nick, Nicholas Chirichillo stood at the kitchen window.

Q. Now, who was outside the kitchen if anybody? A. Well, I couldn't designate which man it was, but there was a man outside put them into the car.

Q. Who was putting them into the car? A. The other helpers.

Q. Which of the helpers? A. Well, I wouldn't specify as to which ones.

Q. Well, who was out there?

Mr. Simandl: Well, now, wait a moment. If she knows; she has said why she didn't know.

The Court: No, she said she wouldn't specify. Now maybe she would. Was Bozza outside?

The Witness: No.

The Court: Was Dominick there?

The Witness: Dominick was there sometimes.

The Court: What was Bozza doing inside?

(Page 114) Mr. Simandl: Well, now, I object. May I respectfully say that, if the Court please, because she hasn't suggested that Bozza was out there.

The Court: I didn't say outside, I said inside. She said certainly he was in there helping cooking the alcohol. Where was Bozza?

The Witness: Well, he wasn't there every day in the week.

The Court: Well, when he was there?

The Witness: He would just come around between two and three times a week he would appear there; he was not there steady.

The Court: When he did come there what did he do?

The Witness: He would help, he would take instructions from Nick and help him around.

Q. When you say help him around the place you mean in connection with the operation of the still? A. Yes.

Q. Now, when these cans of alcohol were loaded into the truck where did those cans of alcohol go from? Was

that the product of the still that was being taken out of the window? A. Yes.

Mr. Simandl: I object to that.

The Court: Well, it has been answered and I don't think it came from the dewy heaven.

Q. You say that it was loaded into this truck of Peter (Page 115) Milito? A. Yes.

The Court: It sometimes was taken away in the sedan by Chirichillo and sometimes in the truck by Peter Milito.

Q. Was that carted away from the still premises? A. Yes, it was.

Q. To what city? A. Newark.

Mr. Simandl: I object.

Q. Did you ever proceed in any of the cars containing alcohol taken from the still premises? A. Yes, I was in Nicholas Chirichillo's car.

Q. Was there any alcohol in that car taken from the still premises on the occasions on which you rode in it? A. The cans were.

Q. The cans were? A. Yes.

Q. Containing alcohol? A. Yes.

Q. Now, were there any other cars which traveled along with your car containing alcohol?

Mr. Simandl: I object to that, that calls for a conclusion and it is leading as well.

The Court: You mean the time she drove along?

Mr. Tyne: Yes, sir.

The Court: At the time you drove along with Chirichillo was there any other car at the house?

The Witness: Sometimes we would follow Pete Mil- (Page 116) ito's truck and sometimes we would

follow Jack Bozza's car. It was the information that he knew where it was being taken to.

Mr. Simandl: I object and ask that be stricken out.

The Court: I sustain the objection. Did you ever hear Bozza say where it was to be taken?

The Witness: No, because the conversation was not in my language.

Q. Do you know whether or not alcohol was placed in all of these cars when they proceeded to their point of destination?

Mr. Simandl: I object to that, that is leading and it certainly is not fair.

The Court: I don't think it is unfair, Mr. Simandl, I think it is leading, frankly, but I think it is not unfair leading; it is not suggesting something that has not been suggested. I will ask you directly, and don't answer until counsel have a chance to object,—at any of the times you followed Bozza's car do you know whether or not there was alcohol in that car?

The Witness: There was not.

Mr. Simandl: I object.

The Court: You object?

Mr. Simandl: I think I am entitled to object.

The Court: Did you hear her answer?

(Page 117) Mr. Simandl: I heard her answer, but I fear to take advantage of anything that I think is improper.

The Court: Well, I don't think it is improper. I know what you think is improper, but what I think controls until you get to Philadelphia, then sometimes it still controls. You would state that so far as you knew there was never any alcohol in Bozza's car?

The Witness: No, there was never any carried.

Q. When you got to your point of destination and before you returned was any preparation made for bringing back material? A. Yes, Mr. Nicholas Chirichillo went to this place which I called the coal yard near the Lackawanna Railway and at that time he made arrangements for stuff that he was going to bring back.

Q. And what would he bring back? A. Bags of coal for the furnace.

Q. Anything else? A. And also more cans.

Q. Cans? A. Cans and the coal.

Q. Anything else? A. Not to my knowledge.

The Court: Did he ever bring any sugar back? I would like to know where he got the sugar.

The Witness When Mr. Chirichillo got the sugar I was in a relative's of Nicholas Chirichillo's House; I was not on those trips.

Q. About how many times a week would you take cans of (Page 118) alcohol from the still premises and transport them in the cars? A. Three times a week.

Q. And how was Milito's truck loaded with this alcohol that was put in there after it was passed out through the kitchen window; what happened to it?

The Court: It was put in the truck. Do you want to know how diagrammatically it was set?

A. We followed his truck to somewhere in Newark and Nicholas Chirichillo went in the direction that he intended to go.

Q. You have identified Jack Bozza and you have also referred to Pete Milito; will you identify Pete Milito? A. The middle one between Mr. Chirichillo and Mr. Bozza.

Mr. Tyne: Identifying the defendant Peter Milito?

The Witness: That's right.

The Court: We will recess now for a couple of minutes. The jury will be excused first.

(A short recess was taken.)

Q. Mrs. Vettor, do you know what the capacity of this still was?

Mr. Simandl: I object to it.

Mr. Tyne: I withdraw the question.

Q. Was this still operated during the daytime and at nighttime? A. Yes, it was.

Q. Who did the cooking during the day? A. Dominick and Nick, Nick and Dominick.

(Page 119) Q. And who did the cooking at night? A. I am afraid I cannot answer that.

Q. You say that Bozza was there three or four days a week? A. Three days a week.

Q. And worked on the still? A. Yes.

Q. Was that in the daytime or the nighttime? A. Daytime.

Q. Following the arrest of the defendants you were placed in the Hudson County Jail, is that right? A. That is right.

Q. And subsequently released, is that right? A. Yes.

Q. And when you were released you came to Newark? A. That is right.

Q. You wanted to get your clothes, is that right? A. Yes.

Mr. Simandl: Wait a minute.

Q. Where were your clothes?

Mr. Cassini: I object as immaterial.

The Court: All right. Now, what is the question?

Q. Where were your clothes?

Mr. Ratner: I object, your Honor.

Mr. Simandl: This is all after the arrest and what she did after the arrest is immaterial.

The Court: You gentlemen might come up here and discuss this matter at side bar.

(Side bar colloquy off the record.)

Q. Mrs. Vettor, you said that you took alcohol from the (Page 120) still premises three times a week.

Mr. Simandl: Mr. Tyne, I didn't hear that question.

Q. You testified that you took alcohol from the still premises three times a week? A. That is right.

Q. Does that apply to the month of December and January as well? A. Yes.

Q. Up until the time you went to the hospital in January? A. That is right.

Q. On the question of transportation of materials into the premises at the time you were in the process of construction do you know what vehicle was used to bring them in?

The Court: What is that?

Mr. Tyne: On the question of transportation of materials.

The Court: Speak up.

Mr. Tyne: On the question of transportation, your Honor, in connection with the bringing of materials to the still premises I am asking the witness if she knows what vehicle was used.

The Court: Bringing materials to the premises?

Mr. Tyne: Yes, sir.

Mr. Ratner: I object to the form of the question. What vehicle was used would not be a proper form.

The Court: Now, what would you suggest would be the (Page 121) proper form?

Mr. Ratner: "Whose vehicle".

The Court: What vehicle is just as important; what vehicle was used if you know?

The Witness: I don't know.

The Court: Did you ever ride with anyone who brought stuff to the still?

The Witness: What do you mean to the still? I don't get the question.

The Court: Well, I mean—you testified that you were with Chirichillo, for instance, when he got some coal and some cans.

The Witness: Yes.

The Court: Where were they taken to?

The Witness: They were taken to this farm on Cleveland Avenue.

The Court: Do you know of any other vehicles that were used to bring stuff to that place?

The Witness: No, I don't.

The Court: Just this one of Chirichillo's?

The Witness: Yes.

Q. The question of the vats that you have identified on the premises—did you see them being brought in?

Q. Yes. A. I saw them outside the house; I didn't (Page 122) see actually in what kind of vehicle they were brought in.

Q. Who brought them into the house?

The Court: We have been all over it. Dominick and Chirichillo and Jack or somebody else that she couldn't remember. Don't go all over it.

Q. That's all.

Ellen Vettor, for Government—Cross.

Cross examination by Mr. Ratner:

Q. Mrs. Vettor, when did you and Chirichillo actually go into the possession of these premises, what month? A. In October.

Q. What year? A. '44.

Q. How do you know it was October?

The Court: Is that your best recollection?

The Witness: That is my best recollection, yes.

Q. And when did they start to bring the material in? A. A couple of weeks afterwards.

Q. And that would be sometime in November? A. Yes.

Q. How long did it take to set up the parts or for the still to commence to operate? Was it a month or more? A. At least a month.

Q. Could have been longer? A. No, it wasn't longer.

Q. Was it some time in December that the construction of a still was completed? A. No, it was in November.

Q. The latter part of November? A. Yes.

Q. And the latter part of November Milito was off the (Page 123) farm wasn't he? You remember that?

The Court: Off what farm?

Mr. Ratner: The farm fronting the property on Cleveland Avenue in Woodbridge Township.

A. Well, I didn't meet Mr. Milito at that time, no.

Q. You didn't meet Milito in October, did you? Yes or no. A. No, not in October I didn't meet him.

Q. You didn't even meet him in November, isn't that true? A. I would say I did meet him in November.

Q. Are you certain about it? A. No, I am not certain about it but I would almost swear to it.

The Court: It is your best recollection?

The Witness: Yes.

Q. When you met him in November he was farming there, wasn't he, harvesting the crop, wasn't he, hay? A. He was around the premises, yes.

Q. Well, he was harvesting the hay, was he not? A. Yes.

Q. That's right; and you knew him as the farmer there, did you not? A. That is right.

Q. And as far as you knew he was always the farmer; that's true too, isn't it? A. I knew him as the man who owned the next farm.

Q. When you say the next farm, on the other side of the road? A. Well, it was the next farm as far as my way of (Page 124) thinking.

Q. What did you mean by the next farm? A. On a clear day you could see over to that property.

Q. Wasn't he also farming behind the building that you occupied as a residence? A. Behind on one side of the building.

Q. On one side? A. Yes.

Q. And he had some hay there or vegetables there that he had planted? A. He had some things there, yes.

Q. And he was harvesting his crop at that time in November? A. Yes, he was.

Q. And he harvested as late as when? A. I couldn't tell you.

Q. Wouldn't you say it was some time until the latter part of November, 1944? A. I really couldn't say.

Q. It could have been the latter part of November, 1944, isn't that right? A. It could have been, I don't know though.

Q. Then after that you didn't see him any more, isn't that true? (No answer.)

Q. When the winter started to set in, the cold, you remember those days you didn't see Milito after the latter part of November, 1944, that's true, isn't it? A. I did see Mr. Milito after that.

Q. On how many occasions, one or more? A. On more than (Page 125) one occasion.

Ellen Vettor, for Government—Cross.

Q. How many would you say, your best recollection? A. I would say several, but I don't know exactly how many.

Q. Several is how many, three or four? A. More than that.

Q. And on each occasion that you saw him there he was on his farm, that is true, isn't it? A. We saw him at his farm and he also was over at Nicholas' farm.

The Court: At whose farm?

The Witness: Mr. Chirichillo.

The Court: What was he doing when he was over at Chirichillo's farm?

The Witness: They were talking, but what they were talking about I couldn't tell you because they were not talking——

Q. Chirichillo's farm was the same ground that was farmed by Mr. Milito? A. Yes, but I mean I designate it that way.

Q. You call it Chirichillo's farm because he leased the property? A. That is right.

Q. When you did see Milito there after the latter part of November, 1944, you either saw him harvesting his crop or else talking with Mr. Chirichillo and nothing more, isn't that true? A. Will you please repeat that question?

(Question repeated by the reporter.)

(Page 126) A. Yes.

The Court: Did you ever see him driving the truck with the alcohol cans in it?

The Witness: I didn't actually see him driving the truck.

Mr. Ratner: May I ask your Honor to give me the answer?

The Witness: I did not actually see him driving the truck, no.

The Court: Where was he when the truck was there?

The Witness: The truck was not in view of the window that I was looking out of, as I call the kitchen of the house.

Mr. Ratner: Is your Honor through?

The Court: Yes.

Mr. Ratner: May I ask the next question?

The Court: Yes.

By Mr. Ratner:

Q. Now, as a matter of fact, as a matter of proof, you never saw Milito driving his truck with any cans of alcohol on it or in it, isn't that true because your observation wasn't there, isn't that so? A. I didn't see the cans in the truck, no.

Q. And you never saw him driving any cans of alcohol either; that's true too, isn't it? A. Nicholas Chiri- (Page 127) chillo followed that truck on more than one occasion.

The Court: Who was driving?

The Witness: It was always his truck; I imagine it was Pete Milito.

The Court: Well, do you know whether it was or not?

Mr. Ratner: I move to strike that out. I am sorry.

The Court: Do you know whether it was or not?

The Witness: Just from hearsay.

Q. And everything you have testified to concerning the activities—strike that out.

Everything you testified to on direct examination on questions asked by the District Attorney concerning the activities of Milito was all as a result of hearsay?

Mr. Tyne: Just a minute.

Q. Isn't that true?

Mr. Tyne: I object to that, if your Honor please, that is a very unfair statement. It is not so, it is not the——

The Court: Well, it is an all-inclusive comprehensive question. I shall allow this witness to reply to it and shall also call your attention, all counsels' attention to the fact that the jury is well aware of what she testified to and I will describe what hearsay testimony is. Did you only hear about what you actually testified to about Milito or did you actually (Page 128) see him at times?

The Witness: I saw him at times, yes.

Q. When you did see him what did you see him do, harvest the crop? A. I saw him harvest the crop.

Q. Yes, and that's all you ever did see him do, isn't that true?

(No answer.)

Q. Isn't that true, Mrs. Vettor?

The Court: Did you ever see him around there at times the truck was being loaded with alcohol?

The Witness: When his truck went out it was the early hours of the morning and I was told that he was out there with his truck.

Mr. Ratner: I move that be stricken.

The Court: Not what you were told, did you ever see him?

The Witness: I didn't see him. I am not used to being up at three or four or five o'clock in the morning.

Q. I will ask you one more question. What kind of a truck did Milito own if he did own one? A. He owned a green truck with black fenders.

Q. The make of the truck? A. I am not aware of the make of the truck.

Q. Did you ever see any truck like it up there before? (Page 129) A. No, I never did.

Q. Would you say there never was another one like it? A. I would say there never was.

Q. You are not positive? A. Well, I never saw it the length of time I was there.

Q. No further questions.

Cross examination by Mr. Cassini:

Q. When was it that you went to the hospital, Mrs. Vettor? A. In December.

Q. Do you know what day in December you went there? A. Not exactly the date, no.

The Court: Was it after Christmas?
The Witness: No.
The Court: Before Christmas?
The Witness: Yes.

Q. Why did you go there, Helen?

The Court: Why did she go there?
Mr. Cassini: Yes.

Q. What was the matter? A. Well, I was getting a very peculiar color in my face, it was starting to turn purple and I spoke to Mr. Nicholas Chirichillo about the matter and he asked what was wrong with my face and when I told him I didn't know what was the matter with my face he looked like he was a-worried. He got worried and he said I had better go to the hospital. I got in a very weakened (Page 130) condition. So he asked me if I had by chance gone up and taken any of the contents out of the cans that was up in the second floor, that is the apartment you might say. So I said yes, while he was out I had gone up and opened up the can and taken some. He informed me that that was one of the cans of stuff that wasn't good. So I was sent to the Rahway General Hospital.

Ellen Vettor, for Government—Cross.

Q. You were sent to the Rahway General Hospital? A. Nicholas took me.

Q. You were taken there or were you sent there? A. Nicholas took me.

Q. And how long were you there? A. I was there a week.

Q. All during the time you were there were you conscious? A. Yes.

Q. And did you speak to anyone there about Nicholas Chirichillo at the time while you were in the hospital? A. Yes, I spoke to—I didn't realize at the time that he was an investigator; he came in and started to ask me questions.

Q. That was how long after you had been there? A. Well, I was only in the hospital one week altogether, and lack of funds, I was removed from the hospital.

Q. And you were taken where?

The Court: Well, how is this material?

Mr. Cassini: Very material, may it please your (Page 131) Honor. I am trying to show now the condition of this woman at the time that this statement was made, if any was made at that time.

The Court: Well, what statement?

Mr. Cassini: Well, there were certain statements made by her at the time.

The Court: There is no statement in issue here.

Q. Who treated you at the hospital? A. What do you mean who treated me?

The Court: What doctor?

Q. The doctor? A. I don't know the doctor's name.

Q. Where were you taken from after you left the hospital? A. I was taken right from there first to Police Headquarters in Rahway and then from there over to the Middlesex County Workhouse.

Q. Did I hear you say that you were told to get out of the hospital because you didn't have funds? A. That is right, I had no money whatsoever.

Q. Where did you go from the hospital?

The Court: She has already told you.

A. To Middlesex County Workhouse.

Q. How long did you remain in the Workhouse?

The Court: How is that material?

Mr. Cassini: I will withdraw the question.

Q. You went to rent this place with Nick? A. That is (Page 132) right.

Q. That is correct. Do you recall the day when that happened?

The Court: You mean, does she remember the day or does she remember the circumstances?

Q. Do you remember the circumstance or the date when that occurred? A. Yes, I remember it.

Q. What month was that in? A. In October.

Q. And how long after you went to that house to rent it, that you went to the landlord's home was it that you took up your residence in this building? A. A few weeks, I couldn't designate just the time.

Q. Did you have curtains with you when you went there? A. We took curtains out there.

Q. With the automobile? A. Yes.

Q. You had the curtains in the car with you? A. Yes, some red and white curtains and some blue and white curtains.

Q. Did you buy the curtains? A. I didn't buy them myself.

Q. And that was in the month of October that you went there with the curtains?

Ellen Vettor, for Government—Cross.

The Court: No, she said a couple of weeks after she visited the landlord.

Q. You didn't see him pay the rent, did you? A. I didn't actually see him pay the rent, no; I saw the slip that he had paid it.

(Page 133) Q. You didn't see any money at all? A. No.

Q. And at that time Nick told you what he was going to do on this farm? A. I asked him what he was going to do on the farm.

Q. And he told you? A. That he was going to make alcohol.

Q. That he was going to make alcohol. At that time had you taken up your residence in that house? A. When he said he was going to make alcohol?

Q. Yes. A. He told me in the Elizabeth address.

Q. What is that? A. He told me that at the Center Street address.

Q. Did you actually see the alcohol being manufactured? A. Did I see it? Yes, certainly.

Q. Where did you see it manufactured? A. I saw it in the cooker as I call it.

Q. Well, what did you see done? A. I saw the sugar being put in the vat and the water being put in the vat and the yeast.

Q. And did Nick Chirichillo put the water in the vats and the yeast in the vats? A. He did.

Q. And did he put the sugar in the vats? A. Yes.

Q. You took up your residence in that home on what day, do you know? A. I couldn't tell you exactly.

Q. And do you know the day you went to the hospital? (Page 134) A. I can't remember just the date.

Q. Do you know how long a time elapsed between the time that you went and adopted that home as a residence and the time that you went to the hospital?

The Court: How long did you live there before you went to the hospital?

The Witness: A month and a half to two months; I couldn't tell you exactly.

The Court: A month and a half to two months?

The Witness: Yes.

Q. I show you G-r and ask you if that is the only bed that was in that house? A. There was a studio couch.

The Court: I might suggest that instead of calling this place a home, which has a rather sacred connotation, it might be termed from the pictures there a dump. That is the only bed that was there, that studio couch?

The Witness: Yes.

Q. I take it then that there were no other bedrooms? A. There were bedrooms, but they were not furnished.

Q. No furnished bedrooms? A. No.

Q. Did you tell us how long it took to erect the still in the premises? A. I mentioned before a couple of weeks, a few weeks.

Q. A few weeks. And who brought the material in the premises for the erection of this still?

(Page 135) The Court: She has said that she doesn't know, that she only saw it outside, that it was carried in by Chirichillo, Dominick or somebody else that she cannot remember. We have been over it about four times already and we are not going over it again.

Q. You tasted some of the alcohol that was manufactured? A. Yes, I did.

Q. How much of it did you taste? A. Drank quite a quantity of it.

Q. And as a result of it you became intoxicated, did you not? A. I would not say intoxicated.

Ellen Vettor, for Government—Cross.

Q. What would you say? A. I was feeling in a good humor, I would not say intoxicated though; I knew what was going on.

Q. Feeling in a good humor; when was it that you were feeling in good humor? A. What do you mean when was it,—during the daytime.

Q. During the day. And was that every day? A. Not every day but almost every day.

Q. Now, you also said that when they took the stuff out they would take instructions from Nick? A. Yes.

Q. Is that right? A. That is right.

Q. And that the material was carried out sometime in the truck of Chirichillo and sometimes in another sedan? A. That's right.

(Page 136) Q. Did you actually see the other sedan carry the stuff out? A. Yes. I was in the car with Mr. Chirichillo following that car at times to Newark.

Q. Were you always with Chirichillo in this car? A. Always; because I didn't want him out of my sight.

Q. And when did you drink this alcohol that you were drinking here at this time that you say you were almost drunk? A. Well, he would go look around the premises to see well, if there were people, like people were horseback riding around; and also he saw people and he would take a walk around the grounds and I would go and sneak myself a big drink out of the bottle.

Q. And you often went out with Nick with his car, is that right? A. Yes. He would tell me, "You can stay here at the farm" and I would say, "No, I am not going to stay at the farm by myself. I don't know what might happen, I am going out in the car with you."

Q. And when he took you along in the car he had material in the car? A. Yes, he did.

Q. And you know what material he had on each one of those trips that you took with him? A. Yes, I knew.

Q. And you had been drinking the material that was manufactured there at the same time, is that right? A. Yes, that's right.

The Court: Anything further?

(Page 137) Q. You say that you often went with Nick to buy coal for the premises? A. Yes.

Q. Coal to be used to heat the house or for what purpose? A. No, for bringing the heat up to the cooker.

Q. You don't know where he bought the sugar that he used for the cooker? A. I don't know where the place is located; I know he parked the car at the time.

Q. And all the sugar came the same way all the time, is that right? A. Yes.

Q. You went for it with him? A. Yes.

Q. Did you ever help make the liquor? A. No, I helped drink it. I didn't help make it.

Q. What is that? A. I helped drink it, I didn't help make it.

The Court: She helped drink it not make it. That is some help too. We will recess until tomorrow morning at 10:30. Be here ready to resume at 10:30, ladies and gentlemen of the jury. The jury will be excused first.

(Adjourned to Wednesday, July 18, 1945, at 10:30 A. M.)

(Page 138)

Wednesday, July 18, 1945: 10:30 A. M.

(Appearances as before.)

ELLEN VETTOR resumed the stand.

The Court: Have you concluded, Mr. Cassini?

Mr. Cassini: Yes, your Honor.

Ellen Vettor, for Government—Cross.

Cross examination by Mr. Simandl:

Q. Madam, you have been in jail for about 10 days, have you not? A. Longer than that.

The Court: The last time.

The Witness: Yes.

Q. You want to get out, don't you? A. Certainly.

Q. I don't hear you. A. Certainly.

Q. Have you any——

The Court: If you can produce anybody who doesn't you might find some reason for asking the question.

Q. Have you any hope of getting out? A. Well, I think I have.

Q. Why do you think so? A. Well, I don't exactly understand that question.

Q. Well, why do you think so?

The Court: It springs eternal in the human heart.

Mr. Simandl: Well, now, if the Court please, I wish the witness would be permitted to answer.

The Court: You what?

(Page 139) Mr. Simandl: I wish the witness would be permitted to answer.

The Court: I will make comments when I feel like it and I don't want you to make comment on my comment unjustifiably.

Mr. Simandl: If the Court please, I have got in a very——

The Court: Ask your question.

Mr. Simandl: May I make a statement for the record?

The Court: No. Ask your question.

Ellen Vettor, for Government—Cross.

Q. I asked you, Madam, whether or not or why—I will withdraw that,—why you think you will get out. A. That is a funny kind of a question, I don't know how to answer that.

Q. What is funny about it?

The Court: What counsel means I think, what he means is have you been promised anything for testifying.

The Witness: No, I have not been.

Mr. Simandl: I don't mean that, your Honor please. I asked her what made her think——

The Court: Well, if you didn't mean that I don't think the question is material.

Mr. Simandl: If the Court please, I think I have a right to——

(Page 140) The Court: How is it material

Mr. Simandl: It shows her motive and interest in testifying. I think I have a right to do it. I am acting very decorously and very respectfully and I am trying to do my duty.

The Court: All right, proceed.

Mr. Simandl: Will you repeat the question, please?

The Court: Why do you think you are going to get out?

The Witness: I don't know how to answer that question, I just think so.

Q. And when do you think you will get out? A. That I do not know.

Q. You have no idea on that score? A. No, I haven't.

Q. You know you are a defendant in this case?

The Court: You know you are indicted in this case?

The Witness: Yes, I know that.

Q. Were you told that you were not going to be tried? A. No, I was not told anything of the sort.

Q. You weren't told anything at all on that score? A. No.

Q. Were you told you were going to be a witness? A. I was told I would have to testify in court, yes.

Q. They told you you would have to testify? A. Yes.

Q. Who told you that? A. The Federal agents.

(Page 141) Q. Who was the Federal agent, please? A. Mr. Flaherty was one.

Q. And how often did you see Mr. Flaherty? A. Three or more occasions; I would say three.

Q. And when is the last time you saw Mr. Flaherty? A. In the Hudson County Jail.

Q. Were you down in this building on Monday last? A. What do you mean was I in this building?

Q. Were you here in this building? A. Yes, I was.

Q. Where? A. Up in the District Attorney's Office.

Q. Did you go over your testimony at that time? A. I did.

Q. With whom? A. The District Attorney.

Q. Was Mr. Flaherty present? A. No, he was not.

Q. He wasn't there? A. No.

Q. Had Mr. Flaherty been at the Hudson County Jail previously?

Mr. Tyne: Your Honor please, if counsel wants to know the fact I will concede——

Mr. Simandl: Well, if the Court please——

The Court: Let him at least voice an objection, will you; what do you want to say?

Mr. Tyne: I will concede that the witness talked with me.

The Court: Well, that is not what Mr. Simandl is concerned with exclusively. Proceed.

(Page 142) Q. Was Mr. Flaherty over to see you at the Hudson County Jail? A. Yes, he was.

Ellen Vettor, for Government—Cross.

Q. Did he tell you you had to testify? A. He said I would be asked to testify.

The Court: Did he tell you you had to testify or you would be asked to testify?

The Witness: I think he worded it I would be asked to testify.

Q. Well, now, a few moments ago you said you were told you had to testify; what did you mean by that? A. Well, he said I would be on the witness stand.

Q. Did he tell you what would happen to you if anything if you didn't testify? A. No.

Q. Did he give you any indication along that line? A. He says whatever I said was of my own free will.

Q. Did he at that time show you pictures? A. Yes, he showed me quite a few pictures.

Q. Yes. And among them was the picture of the defendant Bozza, wasn't it? A. It was.

Q. When is the first time you heard the name Bozza? A. I will admit I did not know Jack's last name at the time.

Q. When did you first learn the name Bozza? A. From the picture.

Q. There was a name on the picture, is that it? A. Yes, (Page 143) there was.

Q. I see. That is the first time that you knew the name Bozza, is that right? A. That is correct.

Q. They came over there or Mr. Flaherty came over there with some pictures and showed them to you, is that right? A. Yes.

Q. Up until that time you had said that a man by the name of Jack and a man by the name of Dominick had been associated in this matter? A. Yes, I did.

Q. I see. You didn't have very much housekeeping to do, did you, at the place at Cleveland Street? A. No, I didn't do much housekeeping there.

Ellen Vettor, for Government—Cross.

Q. As I understood you to say, you devoted considerable of your time to drinking, didn't you? A. That is correct.

Q. And will you tell me about how many drinks you had a day? A. Well, when I wasn't being watched I drank about a quart.

Q. A quart of this alcohol? A. That is correct.

Q. Did you go visiting at all, leave the place? A. No, I did not leave the place.

Q. Didn't I understand you to say that you did go visit this Milito farm? A. I didn't go over there by myself.

Q. Well, I asked you whether you left the premises and went visiting at all. A. I went when Nick went, yes.

Q. Aside from—you say you drank about a quart (Page 144) of this alcohol, is that right? A. That is correct.

Q. Have you any recollection of entering the Rahway Hospital? A. Yes, I remember going into the Rahway Hospital.

Q. Weren't you in a coma and didn't you first realize you were in a hospital when you woke up in the hospital about a day after your admittance? A. No, I did not; I remembered when I went in there.

Q. You remember it, eh? Do you remember being first met by this doctor on your admittance or after your admittance?

The Court: Which doctor?

Mr. Simandl: I am going to ask him to stand, Dr. Kilstein.

A. No, I did not.

Q. Did you see him there? A. No.

Q. This drinking of a quart of alcohol was a daily procedure on your part? A. Well, I wouldn't say it was a daily habit, no.

Q. Well, was it almost daily? A. Well, I drank almost every day, yes.

Q. No further questions.

Re-direct examination by Mr. Tyne:

Q. Mrs. Vettor, when I discussed this case with you didn't I make it clear that your appearance on the stand would be voluntary?

(Page 145) Mr. Simandl: I object to that, that is leading and placing words in the mouth of the witness.

The Court: I think it is perfectly proper, sir, after the way in which you left your insinuation.

Mr. Simandl: Well, no, I don't mind the District Attorney asking any question as to what happened in his office but I object to a fact that he places in the question.

The Court: Did anybody do anything else but say that your testimony should be perfectly voluntary and that you should tell the truth?

The Witness: No.

The Court: Did anybody threaten you?

The Witness: No, nobody threatened me.

The Court: Did anybody promise you that you would be turned loose?

The Witness: No, I received no promises of any description.

Q. When you were met at the County Jail by Mr. Flaherty were you shown a quantity of photographs? A. Quite a pile of photographs.

Q. About how many would you say were shown? You say quite a pile. A. Well, I would say about 80 anyway, if not more.

Q. At least 55 anyway, isn't that so? A. Yes.

(Page 146) Q. And you went through those photographs yourself, did you not? A. That is right.

Ellen Vettor, for Government—Re-cross.

Q. And did you pick out the photograph of Bozza? A. I did.

Q. Will you tell us whether or not, Mrs. Vettor, this is a photograph of Bozza which you were shown? A. Yes, that is it.

Q. You identified that photograph as Bozza, the defendant, who is now sitting in the courtroom in the first row? A. Yes.

Q. On the question of consumption of alcohol as asked by Bozza's counsel, did you drink pure alcohol or was it diluted with anything else? A. It was diluted with water, half and half.

Mr. Simandl: I didn't hear that last answer.

The Witness: It was diluted with water, half and half.

Q. And did you help yourself? A. Nick when he went out would prepare a bottle for me and he would say, "Now, that is your limit for the day."

Q. When the illicit alcohol was being handed out the kitchen window and laid in the truck and the car, were you given anything to drink at that time? A. Not especially at that time, I probably had some at that time but it wasn't given to me.

Q. Who else if anyone besides Chirichello handed you (Page 147) this alcohol beverage to drink? A. He is not in court, it was the person mentioned as Dominick.

Q. That's all, sir.

Re-cross examination by Mr. Simandl:

Q. Now, Madam, from the time of your arrest in January down to the date when you first entered this courtroom yesterday were you ever brought face to face with Bozza and asked to pick him out of a line or anything of that sort? A. No, I was not.

Q. No, that's all.

The Court: Do you recognize this man Bozza as the man who was down there as you testified three times a week?

The Witness: That is right.

Mr. Tyne: Your Honor, please, may I offer in evidence the photograph identified by the witness?

Mr. Simandl: I object to that, if the Court please, there is a lot of information on the back of that photograph.

The Court: I don't think it ought to go in if there is anything else on it except the picture.

(Side bar colloquy of the Court with Mr. Simandl. Photograph shown to Mr. Simandl.)

The Court: Can you cover this up (addressing the District Attorney)? No, you had better not offer it.

(Page 148) Mr. Tyne: That is all, if your Honor please.

The Court: All right, you may step down.

Mr. Tyne: The Government rests, your Honor, please.

The Court: I imagine you gentlemen have some motions you desire to make.

Mr. Simandl: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, the Government has now rested its case and counsel in the performance of their duties desire to make certain motions which affect the law of the situation with which you are not particularly concerned. I shall therefore excuse you for the present and the argument will be had in your absence.

(The jury withdrew.)

Mr. Ratner: May I, your Honor, please, make a suggestion in the procedure of these motions, I think

it would be very feasible if the motions were made in the order in which the defendants were indicated.

The Court: The Motions will be made in the order in which counsel have been proceeding. You were first.

Mr. Ratner: I think Mr. Cassini was first.

The Court: Mr. Cassini was first then you and then Mr. Simandl.

Mr. Ratner: Sometimes Mr. Simandl was second, sometimes he was first and sometimes I was third—just (Page 149) as a matter of regularity, I think if we followed the order in which they were indicted——

The Court: I don't think it makes any difference. You proceed. You started.

Mr. Ratner: Your Honor, please, this is a motion for acquittal as to the defendant Peter Milito on Counts 1, 2, 3, 4, and 5. Substantially, the grounds upon which the motion for an acquittal is urged are because there is absolutely no evidence particularly as to Counts 1, 2, 3 and 4 upon which this Court could justly refer the issue to the jury for its determination.

(Argument of counsel for the motion.)

The Court: Mr. Simandl.

Mr. Simandl: If the Court please, I move for a dismissal of each of the remaining counts in the indictment in behalf of the defendant Bozza upon the ground that there is insufficient evidence to support the allegations contained therein and each of said counts to warrant the submission of the case to the decision of the jury.

(Argument of counsel for the motion.)

The Court: Mr. Cassini.

Mr. Cassini: May it please your Honor, I don't believe it will be necessary——

Motions.

The Court: I think you had better formally make (Page 150) your motion anyhow.

Mr. Cassini: Well, may it please your Honor, I will ask for a direction of verdict for the reason that Chirichillo—on the question of possession and transportation I believe that the evidence there is sufficient against him, but with respect to the other counts there is absolutely no evidence to maintain the Government's case.

(Argument of counsel for the motion.)

(Argument by Counsel for the Government against the motions.)

The Court: I shall reserve decision on the motion of counsel for Milito. I shall deny all motions as to Chirichillo and Bozza. All right, you may send for the jury.

Mr. Ratner: May I just say one thing. Your Honor reserves it, giving me the opportunity to renew the motion at the close of the case?

The Court: Yes, of course. Send for the jury.

Mr. Simandl: May I pray an exception, if the Court please?

(Which exception is hereby allowed and sealed accordingly.) THOMAS F. MEANEY.
(Sealed).

Mr. Cassini: I pray an exception also, your Honor.

(Page 151) (Which exception is hereby allowed and sealed accordingly.) THOMAS F. MEANEY.
(Sealed).

Mr. Ratner: In what order would your Honor suggest that we open to the jury?

The Court: I will leave that to yourselves, you will decide who wants to go first.

Peter Milito, for Defendant—Direct.

Mr. Ratner: Well, I will open first.

The Court: And we will follow that throughout.

Mr. Ratner: I will open first.

Mr. Cassini: It is all right with me, I don't care.

The Court: All right. Then you, Mr. Cassini, second and Mr. Simandl third.

(Proceedings resumed in presence of the jury.)

Mr. Ratner opened on behalf of the defendant Milito.)

(Mr. Cassini opened on behalf of the defendant Chirichillo.)

(Mr. Simandl opened on behalf of the defendant Bozza.)

Mr. Ratner: I will call the defendant Peter Milito. Peter, will you take the stand.

PETER MILITO, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Ratner:

(Page 152) Q. Peter, will you speak up and speak as loudly as you can. What is your full name? A. Peter Milito.

Q. Where do you live? A. Box 86, Harrison Avenue.

Q. Where is that? A. That is in Rahway, you know.

Q. How long have you lived there? A. About three years.

Q. Where did you live before that time? A. I was living in Rahway too.

Q. What address? A. I forgot the address.

Q. Have you always lived in Rahway? A. Lived in Rahway, lived in Newark.

Q. I don't hear you. A. Newark.

Q. Are you married? A. Yes.

Q. How long are you married? A. 12 years.

Q. Children? A. Yes, sir.

Q. Wife alive? A. Yes.

Q. What is your business? A. Farmer.

Q. How long have you been a farmer? A. All of my life.

Q. Now, do you know a lady by the name of Colacarro—pardon me. Strike that out. A. Angelina Caracarro.

Q. That's correct. Who is this lady? A. Old lady. bridge Township? A. That's right.

Q. An old lady? A. Yes.

Q. And did she have some land in Rahway or Wood-

Q. Did she have some land on Cleveland Avenue? A. That's right.

(Page 153) Q. What kind of land was it, farm land? A. Farm land.

Q. When did you first meet this lady? A. Oh, about seven or eight years ago.

Q. How did you come to meet her? A. I know friend, an old man you know.

Q. Now, on this particular land was there a house? A. Yes.

Q. What kind of a house? A. Good house.

Q. Now, did you go into possession, did you go on the land eight years ago? A. Sure, I was a farmer there.

Q. And were you a farmer there continuously for eight years? A. That's right.

Q. So that you were a farmer there in 1944? A. Yes, sir.

Q. Now, some time later in 1944—may I strike that out and ask one ques'on first. Did you pay any rent for the use of the land? A. No, I was to take care of the building.

Q. Take care of what? A. Take care of the house and barn because——

Mr. Ratner: May I ask your Honor to ask the jury whether they understand?

Q. So you were a caretaker there; all right. And that was why you got the land, the use of the land for nothing? A. Yes.

Q. Now, in 1944, did the old lady tell you anything about that she had rented the building? A. Yes, she told (Page 154) me going rent, she says I got to move out when I finish myself on the farm.

Q. When did the old lady tell you that? A. It was in August.

Q. What year? A. 1944.

Q. Did she tell you how soon you would have to go off the premises? A. Well, I told her, you know, as soon as the people move in that I am going to take myself out, everything.

Q. Did anybody help you on this farm? A. All my kids, I had one man too.

Q. Did the wife ever help you? A. Sure.

Q. Is the wife in court today? A. Yes.

Q. Now, when she told you you had to get off the premises she told you she had rented it, did she not, to somebody else? A. Yes, to somebody else.

Q. And what crop did you have planted that you didn't pick up yet or harvest? A. Dandelion, parsley and kale.

Q. Did you have any hay? A. Yes.

Mr. Tyne: I object as leading and improper.

The Court: I will allow it.

Q. Did you have any hay there? A. Oh, yes.

Q. Was the hay on this land owned by the lady? A. No, across the street from the house.

Q. Now, what did you have on this particular land be- (Page 155) longing to the old lady, what did you have planted? A. Dandelion, parsley and kale.

Q. Now, do you remember when you harvested or you had picked up all of the dandelion? A. November 12th I was about picking up all the green stuff.

Q. All the green stuff you picked up by November 12th, what year? A. '44.

Q. When did you pick up the hay? A. 25 November.

Q. After the 25th of November— A. I wasn't there no more.

Q. You weren't there any more. A. No.

Q. Now, in this house that you were taking care of— A. Yes.

Q. —and in the barn— A. Yes.

Q. —tell us what was in this house prior to August, 1944? A. There was all the furniture belong to the old lady.

Mr. Simandl: I don't hear you.

A. There was all the furniture from the old lady.

Q. Furniture? A. That's right.

Q. Did she live in this house? A. Yes; then she went to live with her daughter.

Q. When did she go to live with her daughter? A. I think August, I think she was up there once in a while.

Q. What was in the barn? A. It wall all the tools (Page 156) of the farm.

Q. Did you have tools? A. Yes, sir.

Q. Where were your tools, Mr. Milito? A. You know, old lady give all the tools for the farm to use.

Q. Oh, you used her tools? A. That's right.

Q. Now, after November 25, 1944, you say you went there, is that right? A. Yes.

Q. Now, there was some testimony that you had a key that opened the cellar, is that right? A. I had the key for the barn. They barn key opened the house too. In the house there was a bunch of key, see. The son told me he want to open the cellar. I says, "I got key to the barn to open the house." Then he got the key and opened the cellar.

Q. So that, if the Court will permit me, the keys opening the cellar were in the house? A. That's right.

Peter Milito, for Defendant—Direct.

Q. Now, there was some testimony that you helped your son move out some wine. A. No, not for myself.

Q. Did you go with him at all? A. No, I no went there.

Q. When were you there to open up the cellar? A. I was there.

Q. When was that? A. Around Sunday.

Q. Who went with you? A. The son of the old lady.

(Page 157) Q. What was he doing this particular day? A. He took stuff out of the cellar.

Q. What did he take? A. Some empty barrel, vinegar barrel.

Q. Was there any still in there at that time? A. No.

Q. No, did the old lady, subsequently I mean, did the old lady later move out the furniture? A. Yes, I move myself.

Q. When did you move out the furniture for the old lady? A. I think it was October.

Q. What year? A. 1944.

Q. Now, did you at any time on the 19th day of January, 1945, at Woodbridge Township in Middlesex County, engage yourself unlawfully in the business of a distillery? Do you understand the question? Were you a distiller? A. No, sir.

Q. Did you have anything to do with distilling alcohol? A. Nothing to do at all.

Q. And then did you have anything to do with 600 gallons of mash? A. Nothing at all.

Q. Did you on the 19th day of January have an unregistered still in your possession or under your control? A. No.

Q. Did you, Mr. Milito, conceal two and a half gallons of distilled spirits which should have been taxed? A. No.

Q. Did you, Mr. Milito, unlawfully transport 35 gallons of distilled alcohol? A. No, never.

(Page 158) Q. Did you, Mr. Milito, have anything to do with this case? A. Had nothing to do at all.

Mr. Ratner: You may examine.

Peter Milito, for Defendant—Cross.

Cross examination by Mr. Tyne:

Q. Have you told his Honor and the jury everything concerning your knowledge of this case? A. (No response.)

Q. Do I understand you to say that you lived in the house that was rented to Chirichillo? A. No, not live in the house.

Mr. Ratner: I object, there is no such testimony.

Q. All, right, I want to get it clear. You never lived in that house, did you? A. No, sir.

Q. You didn't occupy the barn attached to it? A. The barn? I take care of the barn too, I had the key. I had all the tools there. I take it out.

Q. Had you ever been in this house that was rented by Chirichillo? A. No, I don't know anything about.

Q. You don't know anything about it, is that so? You had never been in the house at all? A. No.

Q. Well, you opened the door of the cellar with a key to the barn? A. Yes.

Q. You said there was no still in there? A. No, sir.

Q. Well, how do you know there was no still in there (Page 159) if you had never been in the house?

Mr. Ratner: Oh, I object to that.

The Court: I think as a matter of fact at the time that he went into the place under the testimony, the alleged new tenant had not even moved in.

The Witness: That's right, hadn't taken the stuff out.

The Court: It is before the time, according to the Government's own evidence, when the still could have been there or this particular still.

Q. When you opened the cellar door with a key— A. Yes, sir.

Q. —which also opened the barn, did you enter the house?

Mr. Ratner: I object to that, that is not the testimony. May I respectfully say the District Attorney should have paid attention to the testimony. The testimony was clear that he got the key in the house when he opened the door leading inside. There wasn't any key to it that opened the cellar door.

The Court: As I recall, he said he had a key for the barn which opened the house and the key to the cellar was inside that door; that he opened the door of the house, got the key to the cellar and opened the cellar.

Q. You are aware of the fact that both keys opened (Page 160) the respective doors, one to the house, one to the barn? A. That's right.

Q. Where was the key kept? A. What kind of key?

Q. The key that opened the cellar door to the house and also the barn? A. Inside; the small key to the cellar was inside.

Q. Inside what? A. In the house.

Q. What house? A. This house.

Q. The house in which the still was built? A. That's right.

Q. Whereabouts in the house? A. Inside, on the right side.

Q. How did you get inside the house to get the key? A. I had key to the house.

Mr. Ratner: Your Honor please, he said he——

A. (continuing) That's the same lock, same thing.

The Court: Do you understand him? He says the barn key was the same key which would open the house door.

The Witness: Same thing.

The Court: And that he used the key to the barn to open the door of the house.

The Witness: Same key.

Q. Then you knew that the key to the cellar was in the house? A. Yes, sure.

(Page 161) Q. And where was that key found when you opened the door with the key to the barn which also opened the cellar door? A. Inside near the window in the house.

Q. How long did you know that that key was there? A. That key in the house?

Q. Yes. A. I know plenty long time.

Q. How long? A. When the old lady was over there she said, "I will leave the key; if you want to go downstairs to get something, go in the house, take care of everything."

Q. In other words, she gave you the key to enter the house to get what you want, is that right? A. That's right.

Q. And did you have occasion to use that key to go into the house when you wanted something? A. Sure.

Q. How many times did you go into the house? A. Couple of times, because I had nothing to do there.

Q. You testified before that you had never been in the house.

The Court: I think you are losing an awful lot of time.

Q. How long did you live in Newark? A. Oh, about 10 years.

Q. Ten years. How long ago? A. In 1929 I lived in Newark, roughly 1929, and I lived one time in Brooklyn.

Q. You lived in Brooklyn? A. I was in Brooklyn one time.

(Page 162) Q. Whereabouts in Brooklyn did you live? A. 67th St.

Mr. Ratner: I object, not proper cross-examination. A. (Continuing) Sixteenth Avenue.

Mr. Ratner: May I object to this line?

The Court: Yes. I sustain the objection.

Peter Milito, for Defendant—Cross.

Mr. Tyne: I think it is very material.

A. I lived there five or six years.

The Court: How?

Mr. Tyne: As to this man's activities during this period of time, but I have to divulge my purpose in answering the question.

The Court: Come up to side bar.

(Side bar colloquy).

Q. You say that you were a farmer all your life?

The Court: Except while he was living in Brooklyn.

A. Yes. When I come from the other side I was working eight years on a farm.

Q. Did you have a farm in Newark? A. Well, 1929.

Q. And you lived in Woodbridge Township three years or eight years? A. About three years.

Q. You say that you were acquainted with the Colacarros, is that right? Did you meet them out in Woodbridge when you went out to take care of the farm? A. Before I moved Woodbridge I was live in Newark.

(Page 163) Q. No. Did you meet the Colacarros when you went out to Woodbridge? A. Oh, yes.

Q. Is that the first time you met them? A. Oh no, I know them for long time.

Q. You knew them for a long time? A. Yes.

Q. How far is this farm that you occupy from the Colacarro farm? A. About a mile.

Q. About a mile. And you weren't paid anything for working that farm? A. No, was to take care.

Q. Who owned the farm? A. Angelina Colacarro.

Q. The same farm that you worked? A. Not the one I work now.

Q. No, the one that you worked at that time? A. Angelina Colacarro.

Peter Milito, for Defendant—Cross.

Q. And that farm was a mile away from the Colacarro house in which the still was found, is that right? A. That farm I was in 1944, Colacarro, yes, one mile away.

Q. You made your income from planting parsley and kale? A. That's right, and dandelion.

Q. Dandelion. Is that all you planted? A. No, I planted tomatoes, everything. You see tomatoes from the frost is gone, dandelion I plant.

The Court: I don't know what you are trying to do. I don't care about his dandelions or tomatoes, I want to get at the facts whether he knows anything about this (Page 164) case.

Q. You said that you used your truck to pick up your produce? A. That's right.

Q. What kind of truck. A. I had International and little pick-up truck, Pontiac.

Q. Did you use the International truck or the little pick-up truck to pick up this parsley and kale? A. The parsley I used small truck; the one I picked up hay was the big truck.

Mr. Ratner: I don't want to waste the time of the Court.

The Court: I don't want to waste the time of the Court and it is being wasted. Let us get right to the heart of this thing.

Mr. Tyne: I think I am, sir.

The Court: I don't think you are. Go ahead.

Q. What color was this truck that you used? A. The small truck?

Q. Yes. A. Little black one, pick-up truck, black one.

The Court: How many trucks did you have?

The Witness: Two.

The Court: Did you have a green truck?

The Witness: One green and one black.

The Court: The green one was a big one?

The Witness: Yes.

(Page 165) The Court: The black one a little one?

The Witness: Pick-up truck small one.

Q. Did you use the big or little truck to pick up the—
A. Green truck I picked up.

The Court: I don't care what truck he used for his own produce. Was either one of your trucks ever rented out to Chirichillo?

The Witness: No, sir.

The Court: Did you ever use your truck to carry anything out to Chirichillo's house?

The Witness: Nothing at all; got nothing to do.

The Court: I don't care how he carried his tomatoes or his dandelions.

Q. When you were in the vicinity of the Colacarro form which was rented to Chirichillo, did you have your green truck with you? A. No, sir.

Q. You did not? A. No.

Q. Are you acquainted with Bozza here? A. No, sir.

Q. You don't know him? A. No, sir.

Q. When was the first time that you met him? A. Who, Bozza?

Mr. Ratner: I object, he says he doesn't know him.

A. Right here.

Q. The first time you met him when he came in court today? A. That's right.

(Page 166) Q. When was the first time you met Chirichillo? A. Chirichillo I see up at the place, he says hello, that's all.

Peter Milito, for Defendant—Cross.

Q. When was that that you first met him? A. November.

Q. In November? A. Yes.

Q. Of 1944? A. '44, that's right.

Q. Where did you see him at that time? A. While I was pick up the stuff myself on the farm.

Q. Was that near this farm house in which he lived? A. That's right.

Q. What was the distance? A. About 50 feet—40 feet—40 or 50 feet.

Q. And at that time you were picking up your produce, is that right? A. That's right.

Q. November 25 did you say that you— A. I picked up my hay.

Q. You remember specifically that date, do you not? A. Well, I know it was Saturday and Sunday I am sure, because I got help because my kids go to school weektime and Saturday and Sunday is home.

Q. You remember that date specifically, is that so? A. Saturday and Sunday I am sure I pick up for myself.

Q. Do you always pick up your hay on Saturdays and Sundays? A. Yes.

Mr. Ratner: I object. Can't we get to the meat of this?

(Page 167) Mr. Tyne: When I am heading into something that might be dangerous to his client he objects.

Mr. Ratner: Oh, I don't think you have anything in the case that is dangerous to my client, sir.

The Court: All right, all right.

Q. Do you know what the condition of the weather was in 1944? A. Weather? One time rain, one time good day.

Q. You know that the weather was extremely cold 1944 in November?

Peter Milito, for Defendant—Cross.

The Court: What are you trying to show, will you please give me an indication.

A. Some day was all right.

The Court: Because as far as the evidence of the Government is concerned, nothing was done about the erection of this still or its operation until three weeks after the beginning of November.

Mr. Tyne: Yes, I appreciate that.

The Court: Well, suppose it was cold.

Q. Do you know Mr. Iorio? A. Sure.

Q. You know him? A. Yes.

Q. What is his business? A. He got the farm.

Q. Did you go to his place of business at any time? A. Iorio?

Q. Yes. A. Once in a while I need help or something. I know if he need help he come to me, says, "I need horse (Page 168) couple of days" I give it.

Q. Were you ever convicted of a crime? You were convicted of a crime of violating the Alcohol Beverage Law once?

Mr. Tyne: I object to that.

A. No.

The Court: Were you convicted of crime?

The Witness: I had nothing to do.

The Court: Were you ever convicted of a crime is the question.

The Witness: Your Honor, I don't understand.

The Court: You don't understand that.

The Witness: No.

The Court: Let's see if I can make it clear. Were you ever tried before a jury or before a judge and found guilty of a crime?

The Witness: I haven't guilty.

The Court: You were never convicted of crime? Do you remember back in 1934 that you were charged and convicted?

The Witness: That's right.

The Court: Of aiding and abetting a violation of the Beverage Control Act?

The Witness: That's right, I was just a witness.

The Court: You were just a witness?

(Page 169) The Witness: A person that was in my place, in Nick's house.

The Court: Weren't you convicted and found guilty, you yourself, not as a witness? All right, go ahead.

Q. You were sent to jail, weren't you? A. Yes, sir, one night.

The Court: Well, he couldn't have been sent to jail without being convicted unless a great miscarriage of justice occurred.

Q. And it had to do with the offense you are now charged with, didn't it?

Mr. Ratner: I object, that is highly prejudicial, that statement.

The Court: You may ask him whether the conviction was not for a specific charge, ask him that.

Q. You were convicted and sent to jail for violating the beverage laws, weren't you, the Alcohol Beverage Laws, weren't you? A. I was one night in jail, yes, one night.

Mr. Ratner: He said one night.

The Court: Does the record show he was fined?

Mr. Tyne: The record shows he was fined $200 or 30 days in jail.

Peter Milito, for Defendant—Cross.

Mr. Ratner: For an ordinance, wasn't it, Mr. Tyne?

Mr. Tyne: I object to that.

The Court: No violation of the Beverage Control (Page 170) law. All right, go ahead.

Q. When counsel asked on direct examination if you were engaged in the business of a distillery your answer was no, wasn't it? A I don't remember.

The Court: Yes, that was his answer.

Q. You know what a distillery is, don't you? A. Yes.

The Court: Do you know what a still is?

The Witness: Yes.

Mr. Tyne: May I have a moment, sir?

Q. Did you in the winter of 1944 assist Chirichillo with your truck? A. No, sir.

Q. Do you know what kind of a car Chirichillo had? A. Kind?

Q. Yes. A. He had black car, I don't know what kind.

The Court: No, what kind of car did Chirichillo have?

The Witness: Had a black car, I don't know what kind it was, Pontiac, I don't know what it was.

Q. And didn't you during the winter of '44-'45 use your truck to pull his car out of the snow? A. One time, one night.

Q. One night? A. Yes, sir.

Q. When you went to market with your produce you had underneath your produce, cans, did you not? A. Make a mistake, that is very biga mistake.

(Page 171) The Court: What do you mean it is a big mistake? Did you have them or didn't you have them?

The Witness: No, sir, I have nothing.

Q. And wasn't it on the occasion that you went over to Chirichillo's house in which this still was on the occasion you pulled his car out of the snow, wasn't that one of the times that you were getting ready to transport illicit alcohol in your truck underneath your produce? A. No, sir.

The Court: Anything further from this witness?

Q. Just one or two other questions. You had a green International truck, didn't you? A. That's right.

Q. I think that's all.

The Court: Step down.

Mr. Simandl: Just a moment, one question.

Cross examination by Mr. Simandl:

Q. Did you ever see Bozza around that place out there? A. No.

Q. That's all.

Mr. Ratner: The defendant Milito will rest.

(Page 172) Nicholas Chirichillo, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Cassini:

The Court: We will take a five-minute recess.

(A five-minute recess was taken.)

Q. Mr. Chirichillo, where did you live before you went to this Cleveland house? A. In Elizabeth.

Q. And where did you live in Elizabeth? A. 213 Center Street.

Q. And when you were living there will you tell us what happened? A. In Elizabeth?

Q. Yes. A. Well, I had this Mrs. Vettor as a housekeeper.

Q. Are you married? A. I am widower.

Q. Have you any children? A. Have three.

Q. And— A. I have three in foster home.

Q. In foster homes? A. Yes.

Q. And Mrs. Vettor was keeping house for you at this address 213— A. Yes. Well, reason why I had Miss Vettor keep house, my oldest boy 14, I didn't want to break up home, I want to keep the furniture so as soon as they are big I can have him home.

Q. How long had she been living with you at that address? A. I say full six months.

Q. And then what happened? A. Well, then I was working Valco Brass Copper and I got hurt my toe, I was getting compensation and you know, I had to keep my children.

Q. Did you go to Newark? A. I went to Newark.

Q. And when you came to Newark you told some one you were (Page 173) in need of a job? A. I happened to be in Newark on Fifteenth Avenue and 8th Street amongst a bunch of men which came from the other side; I happened to speak up, I says, "I am only getting $20 a week, I got to meet this date the 15th, to keep my children." Of course, when I spoke up I says, "I would like to get a job sometimes." In the meantime I had work in my own back yard and as far as the hours, I says, "I would like to get a light job after that even if it was a poor job"

Q. What happened after that? A. So this was on a Sunday. Through the week a couple of men came over to the house; they didn't say who the party was, they says, "A friend of yours sent us down here to you, said you are looking for a job. Now, if you want a job as a driver I think you can have it." So I says, "All right." He says, "We will rent you a place where you don't even have to pay rent like you do on Center Street." So I says, "All right." They went off. I didn't see them for about a week. They

came back, they took me to this place in Woodbridge. They showed me the house and says, "Would you move?" I says, "Yes, there is a little land in back of the house I can have little crop for myself and when time comes, if my children have little vacation, I can have them out in the country here." All right; they went off. Now, this John and Tony said to me, "All right, we will give you the money and you go (Page 174) rent this place."

Q. Did they give you the money? A. So they give me the money, I rented the place.

Q. How much money did they give you? A. For the rent.

Q. How much was it? A. Just $10 deposit.

Q. $10 deposit? A. Yes.

Q. And you gave that deposit? A. I gave that deposit and they says, well, he says, this Tony said to me, he says, "This is rent of Frank Basillo, Frank Basillo, he rent the place."

Q. Who said that? A. Tony. So I went over and done just as I was told. So later on, it took him about three or four weeks, they put them out because the house was not vacant.

Q. Wait a minute. Now, here is a receipt for $25 for the coal and $25 for December rent from Basil. Is that the receipt that was given to you? A. Yes.

Q. And is that your name here "Nicholas Chirichillo"? A. I cannot see. That is my name that I give my right name when I made the payment. Being that I paid it I put my right name down.

Q. After you put your name on this paper do you know what happened to his paper; did you have this paper? A. No.

The Court: When did you put your name on the paper?

(Page 175) Q. Do you know when you put your name on the paper? A. I don't put my name on the paper.

Q. Well, your name is on here, as you saw. A. But it was not in my possession, I didn't have it.

Q. You mean you don't know how it got here? A. No, I don't know how it got here because I didn't have it.

The Court: Well, did you write your name on?

The Witness: Yes, that's my name on there, "Nicholas Chirichillo."

The Court: No, did you write your name on it?

The Witness: Yes.

The Court: When?

The Witness: Well, when I paid that rent; I don't remember the date. I cannot read and write, I only write my own name.

Mr. Cassini: This is marked G-2, your Honor, there is no date on it.

The Court: It says, "Received $25 for the coal, $25 for December rent from Basil."

The Witness: Yes, but then, see, I——

The Court: Did you tell them your name was Chirichillo?

The Witness: I put my name.

The Court: No, did you tell them that your name was Chirichillo?

(Page 176) The Witness: No.

The Court: All right.

The Witness: But this is my handwriting.

Q. You don't know how that name got on here, do you? A. No.

The Court: Well, he doesn't know how his name got on there; he says it is his own handwriting.

Mr. Cassini: It is his handwriting.

Mr. Tyne: Then he knows how it got there.

Mr. Cassini: There is no dispute about that.

Q. Now, you said you paid a ten-dollar deposit. A. When I went to rent place.

Q. Do you know when that was that you went there the first time to rent the place? A. In October some time.

Q. In October some time. And you were renting the place for when, beginning when? A. Beginning the following month.

Q. That would be November 1st? A. November 1st, which I didn't get there till around December.

Q. When you say you didn't get there you mean you didn't actually get into the house until December? A. Because everything is in there, they haven't got it out yet.

Q. So you didn't get in there until after the First of December? A. Right.

(Page 177) Q. Now, can you tell me what this $25 was that you got a receipt for from—what did you do after you paid the $10.—strike that out, please.

After you paid the $10 when was the next time that you paid any more money on this lease? A. After she had removed the furniture.

Q. How much did you pay her then? A. I give her month's rent, I give her the month's rent.

The Court: How much?

Q. How much was that? A. $25.

Q. In other words, the rent was to be $25 a month? A. Yes.

Q. So you gave her a $10 deposit and then you gave her this $25? A. More.

Q. More. So that was $35. A. I tell you, they had coal in the cellar——

Q. Yes? A. —and she said to me, "Don't put me to the trouble, move my coal from the place." She says, "You can buy it from me."

Q. So how much did you pay for the coal? A. $35.

Q. For the coal? A. Yes, $25 for coal, $25 for rent.

Q. So that this is the receipt for $50? A. Yes.

Q. Now, how much did you give her when you went to her the second time, you gave her this $50? A. No, I gave her $25 first, then I went later and give her $50.

Q. Well, what was the deposit; did you take back the (Page 178) money as a deposit or did you give her additional money? A. No, I didn't get receipt for that, that went on the coal account. She had coal down in the cellar, she said it was $35.

Q. Did you sign your name to this lease? A. That ain't my handwriting.

Q. Well, you entered into a lease with these people under the name of Basil or Basillo, is that right? A. That's what I was told when I went there.

Q. And that is what you did? A. I done the same thing.

Q. Now, when you gave her this $50 how much money did the landlord already have on account of the rent? A. I don't think she was paid in full, I think we still owed her $25.

Q. They still owed her $25? A. Correct.

Q. You mean they still owed her $25 of the rent?

The Court: I don't see the importance of this, he admits that he rented the place under the name Frank Basillo.

Q. Well, after the place was rented can you tell us how the still got into this house, did you move into the place? A. I didn't move into the place, I still remained at 213 Center Street.

Q. Well, when did you first go to the place to live? A. Well, really to live I brought studio couch out which I was told when they started, when I start to bring coal and (Page 179) stuff down——

The Court: Well, I thought you wanted to get a place to keep your furniture and keep your home together.

The Witness: In a minute, your Honor, I will come to that.

The Court: Come to it now, not in a minute.

A. (Continuing) You see, then when I found out that I was carting stuff on this car and I seen a boiler down in that cellar I said I don't think I should bring my furniture in this place. This was early part of December. So I had coal and everything else, so I see the boiler. I had nothing to do. And when I found pipes going through the place I said this place don't look so good to me and I am not going to bring no furniture into this place. When I found tins in my car out there, five-gallon cans, I said this is no place for me to live in. So this party by name John walked in and I got fighting, I said, "Here now, I am six or seven weeks I am not getting paid. Another thing, I am going to leave this place because I don't want to be here." My answer was, "You will stay and like it."

The Court: Whose answer was that?

The Witness: And I really got scared.

The Court: Who said that?

The Witness: John.

The Court: Which is John?

(Page 180) The Witness: Well, I don't see him here—the two people, I mean, Tony and John. I don't see them in this court.

The Court: Do you know who they are?

The Witness: If I see them I find out.

The Court: Do you know where they live?

The Witness: They never told me their last name or their residence. I would only be too glad to find them today; I have been looking for them since the day I was caught with that car. I have been looking for them ever since because I never got paid and I had to go out and get a loan of money to keep my children.

Nicholas Chirichillo, for Defendant—Direct.

Q. Did you put up the still that was there? A. I had nothing to do with hooking up the still.

The Court: Did you see it put up?

The Witness: I see that when it was put up and I was approached to go to it and they wanted me to operate it.

Q. And did you operate it? A. I didn't know how until finally they got somebody by name Pete, as Mrs. Vettor says.

The Court: So John and Tony and Pete—do you know Pete's last name?

The Witness: No.

The Court: Do you know where Pete lives?

(Page 181) The Witness: No, they brought him in two or three days later to operate.

The Court: John and Tony brought Pete in to operate?

The Witness: Yes.

The Court: What were you doing?

The Witness: I was just simply outside driving car. They bought car for me, I go to Newark and they said we will meet there, certain street around here in Newark, I would be told to get out of that car.

The Court: Why did you go back there again?

The Witness: Well, I really got scared when he says I will stay and like it, I thought they would pick me up in the street and knock my head off.

The Court: You weren't doing anything there?

The Witness: No, but they told me they didn't like it. They scared me, that was the only reason I remained. Now Mrs. Vettor is here——

The Court: Was she out there too?

The Witness: She was there when I was arguing with this John.

The Court: Did she live out there in that place?

The Witness: She come in and out with me.

The Court: Did John and Tony tell you to take her out there too?

The Witness: Well, she was keeping house. Now, (Page 182) when I was arguing with this John and Tony that I was not getting paid, Mrs. Vettor will identify to prove that they didn't like it.

Q. What were you paid for, what were you supposed to get? A. I was supposed to be paid to drive that car, and I was told when the place was rented that they were going to put lot of chickens there and they were going to send them to market.

Q. Well, did they ever buy chickens for you to transport? A. No, sir.

Q. What did you transport afterwards? A. Afterwards when I first started for first two weeks, I was cart four or five bags of coal or coke in the car and I was told to put it in the cellar.

Q. What else did you do? A. After that I have come here I was told to get out of the car. First thing I knew there was five bags of sugar in the car; they said, "Put it in the kitchen."

The Court: What kind of a car was it?

The Witness: A Ford sedan.

The Court: Did you ever carry any chickens in that?

The Witness: They were going to get truck. They said "We will buy this for your own use, we will buy this car for your own use to get away from the car."

Q. They bought you this car, did they? A. Yes.

(Page 183) Q. How much did you pay for the car? A. They paid for it, not me because I didn't have any money to pay for it.

Nicholas Chirichillo, for Defendant—Direct.

Q. It was bought in your name, wasn't it? A. They put it in my name absolutely.

Q. What was the amount that was paid for it? A. They paid $250, that's what they paid for it.

Q. What kind of a car was it? A. A Ford sedan, '36; and the man that was there yesterday, they sold that car.

The Court: John and Tony made you go out there, is that right?

The Witness: They didn't make me, they spoke to me and I thought it was good for me to get this $100 a week to keep my children.

The Court: But later on——

The Witness: Later on when I wanted to quit they told me to say there and like it.

The Court: And you were afraid of John and Tony?

The Witness: That's the God's honest truth.

Q. Did you ever see a fellow by the name of Anthony Colacarro, the son of the party— A. I did.

Q. And do you remember telling him that, "I don't want you to come around here nights"? A. Here is the way I put it to him: I says, "If I am out and Mrs. Vettor should be here alone nights and anybody should come at that door," that is what I put it, I says, "she may get scared."

(Page 184) The Court: Well, did you live there nights?

The Witness: Well, I stayed there couple of nights, but I was only there on the studio couch.

The Court: Were you going to leave her there alone?

The Witness: No, she went to Center Street, I have a five-room apartment in Center Street, Elizabeth, 213.

Nicholas Chirichillo, for Defendant—Direct.

Q. While you were there you heard Mrs. Vettor say you put sugar in the vats? A. I brought sugar to the place but not in the vats. She could sit here and tell the truth if she wants to.

Q. You took the sugar there though, didn't you? A. I will admit I took it to the kitchen, yes.

Q. And you never put any sugar in the vats? A. I never put any in the vats.

Q. Did you ever put any water in the vats? A. I never put any water in the vats; I hooked up a hose there one day.

Q. You hooked up what hose? A. The hose and leads that goes to the vats, and that's the most I done about the vats.

Q. Do you remember seeing Inspector de Pietro? A. I have, in Rahway, Rahway County Jail.

Q. And do you remember saying to him,—What did you tell Inspector de Pietro? A. They wanted to know about Tony and John, who they were. I said, "I can point them to (Page 185) you if they were in my sight."

Q. Didn't you at one time attempt to go down to the boiler room or near the boiler room? A. Boiler room? You mean where the boiler was in the cellar?

Q. Yes. A. I used to go into that cellar often with coal.

Q. Now, when you went in there did anything ever happen to you by the fellow who was taking care of the boiler? A. No.

Q. Did you know how to operate one of those boilers? A. Well, it is low pressure, you throw coal in, that's all I know; they asked me to go down and throw couple of shovels of coal in and probably I did.

Q. Do you know how to make alcohol? A. No.

Q. Did you ever make alcohol? A. No, sir—the first time and I was caught in the trap, little mouse in the trap.

Q. Well, tell me, did you ever go down to put your hands on any of the valves downstairs or any of the valves in the house pertaining to the still? A. They had a fellow there that operated that still and I had occasion to be with him

and I happened to put my hand on one of the valves. He said, "Get your hands off of there, you don't know about these things, you may blow it up."

The Court: Who said that?

The Witness: Fellow by the name Pete was running (Page 186) that place.

The Court: Was Tony there then?

The Witness: No.

The Court: Was John there then?

The Witness: No, just Pete; Pete just come in there by himself I guess. I didn't even have a key to the place toward the end, they took that away.

Q. Will you tell us the condition of Mrs. Vettor while she was living there; did you give her this liquor or did she take it herself? A. More what she took when nobody looked at her. If I was out and she thought she could got it she went out and got it.

The Court: When you were out was Pete there or John there?

The Witness: Pete, when I went out Pete was there, I would be out for the day. From Woodbridge I made three calls in Newark to get coal and go back with more coal; I would have to make two trips.

The Court: Did she go with you?

The Witness: Sometimes, maybe on a couple, two occasions she did.

Q. When you went out and returned can you tell us what her condition was—how long were you on this farm or on this place? A. Well, I really start to go in this place in December.

(Page 187) The Court: How long were you there altogether?

A. (continuing) I went there off and on but there was nothing there and I was waiting for them, they said they was going to raise chickens on the place. I really went to the farm because I had nothing to do and I thought they were going to put chickens in there.

Q. Did you hear Helen say that you took the cans of alcohol out and she was in the car with you? A. Well, I admit that I did haul it.

Q. What was the condition of Helen every time you left and when you returned? If you went out on business and returned what was her condition? A. If I was there she was never too far gone in drink, because I wouldn't let her have it; but if she stayed around Newark or Elizabeth by herself, her condition, she would be plain drunk.

Q. You mean if she stayed around Newark? A. If she stayed around Newark or Elizabeth by herself or otherwise, she would be really drunk.

Q. Well, if she remained in the premises alone what happened? A. She would be drunk, same old stuff.

The Court: If you were there you wouldn't let her get drunk, is that right?

The Witness: I wouldn't give it to her. You can go out and drink Government bond and if you get too much it will kill you anyway. Myself, I don't drink.

(Page 188) Q. Were you always with her when this place was rented, from December, 1944? A. Yes, she was with me; on few several occasions she was left there with Pete.

Q. With what? A. She was left there with Pete on a few several occasions, she didn't go with me.

Q. And while you were there did she drink? A. She probably had two, three drinks, but I wouldn't let her have no more.

Q. How did you control the amount of drinks that she had when you were there? Were you always looking at

her? A. If I was at that farm house the full day, which I was never there a full day, I would give her a half pint, eight drinks and I would say, "It has to do you."

Q. Did you hear the testimony about these bottles in the kitchen? A. I heard the testimony but I didn't put them there.

Q. Well, the alcohol was always available to her, was it not? A. That's all she was looking for.

Q. I mean it was always where she could get it? A. Well, I don't know where it was.

Q. But there was alcohol in the house? A. If the alcohol was in the closet she must have placed it there.

The Court: Well, did you know where the alcohol was?

The Witness: It was really Pete used to bring it (Page 189) down to her, and if I seen Pete bringing a full pint I wouldn't let her have it.

Q. Now, can you tell us when she was taken to the hospital? A. In January, I don't know the date that she was taken in.

Q. Do you know what date in January it was? A. No.

Q. Did you take her there? A. I took her to the hospital, yes.

Q. Do you know where you took her before you took her to the hospital? A. I took her to a doctor.

Q. Why did you take her to a doctor? A. The doctor says she had pneumonia, she had to go to the hospital.

Q. What was her condition before you arrived to the doctor? A. Her condition—I had been out and she had been drinking.

Q. Well, was she able to stand on her own feet? A. From my car she walked in to the doctor's.

Q. Without any assistance? A. Well, she held on my arm, but she walked into the doctor's with me when I took her to the doctor's in Rahway.

Nicholas Chirichillo, for Defendant—Direct.

Q. Was she able to walk into the doctor's alone without your assistance? A. I didn't go away any more getting out of the car.

The Court: After you left the doctor's where did you go?

(Page 190) The Witness: Right to the hospital.

The Court: Did she walk into the hospital?

The Witness: No, when I got to the hospital they took her in; I took her out of my car and they took her in. She probably would walk, but the doctor called out—I don't know what the doctor says at the hospital, but they come and got her out.

Q. And when did you next see Helen? A. I went in there and seen her once on Sunday.

Q. Where did you see her? A. In the hospital.

Q. In the hospital. And when did you see her again? A. I didn't see her until I seen her in Rahway County Jail.

Q. Well, did you see her the morning that you appeared in the Police Court? A. Yes, that's the morning I mean.

Q. Did you ever take any of that alcohol that was manufactured in that plant, place it in tin cans and bring them to Newark or any other municipality to sell? A. I never sold it, I never knew where it went.

The Court: Did you have it in the car?

The Witness: Right in the car, but I was told to get out of the car. This John says, "Get out of the car." He got in the car. Where he went with it I don't know.

The Court: Where did you meet John?

The Witness: He would say he would meet me at 10th Street or 14th Street or Bergen Street or other places, (Page 191) delay like. I went out two times a week with it or three times and they would always tell me to meet them at different places.

Nicholas Chirichillo, for Defendant—Direct.

Q. Can you give us an idea— A. (continuing) So every time I met them they said, "Leave the car, go in there and get yourself a cup of coffee."

The Court: Who was that, John?

The Witness: And Tony, both they told me.

The Court: Why didn't you look for them to find out where they went?

The Witness: I been looking for them because I didn't get paid, all I got was $135.

The Court: Suppose you found them, what would you do?

The Witness: I would turn them in because I would have plenty protection, because I know that the Government would protect me from them today. I would point them right out if they were in this courtroom now.

The Court: Well, did you ever think about pointing them out to the Government before?

The Witness: Well, I didn't run across them since I was picked up.

The Court: You ran across them every time you came into Newark with the alcohol.

The Witness: Yes.

(Page 192) The Court: Did you think of turning them over to the Government then?

The Witness: Well, I was scared, but now I know I would get protection. Mrs. Vettor is there and she can admit that what was said to me was "Stay and like it."

Q. Was there any alcohol made in that house to your knowledge from the date that Helen was taken to the doctor's? A. No, from the date she was taken to the doctor's I haven't taken a thing out of there.

Q. When was the last day before you took her to the doctor's that anything was taken out of the premises? A. I would say a week.

Q. A week before? A. Yes.

Q. How long is it you haven't seen this fellow Tony and John? A. I haven't seen them three days before I was arrested.

Q. Three days before you were arrested? A. Yes.

Q. And you haven't seen them from that day until this date? A. I haven't seen them, I have been looking for them.

Q. Is it true that you put cans of alcohol out the window to a truck? A. Not to a truck, into the car.

Q. Into a car? A. Not to the truck, I didn't see any truck.

Q. And is it true that, as Helen says, this other fellow would take instructions from you and help you? A. No, (Page 193) that is not true, because how could I give any instructions when I don't know how to manufacture it myself?

Q. Did you ever give anyone instructions on what to do with alcohol or what to do with the mash or what to do with any of the things in the premises with reference to the manufacture of this alcohol? A. No, because they always had a man there for that purpose.

Q. Did Milito ever take or carry any alcohol from or to the place? A. Not to my knowing.

Q. To your knowledge? A. No, sir.

Q. Did Bozza ever take any alcohol from or to the place? A. Who is Bozza?

The Court: Who is Bozza, this man has been called Bozza all through the trial.

The Witness: Well, I never met him there. There is a man darker than him, his name is John, and a skinny, tall fellow.

The Court: A skinny, tall fellow you say?

The Witness: His name is Tony.

The Court: Well, what was John like?

The Witness: John was darker than him and not as heavy.

The Court: Anything further from this witness?

Nicholas Chirichillo, for Defendant—Cross.

Q. Is it true that you and that Nick and Dominick operated this still at night, operated it in the day and (Page 194) at night? A. I never operated the still. As much as I done I was told to go down and put a few shovels of coal on the fire. Most of the time I was not there.

Q. That's all. Cross examine.

Cross examination by Mr. Tyne:

Q. Do I understand you to say that you were paid a hundred dollars, a hundred dollars a week, is that right? A. That is what I was supposed to get.

Q. Who promised you that, John and Tony? A. Yes.

Q. To run the farm? A. Yes, that is what it was supposed to be, but I found out what it was.

Q. To raise chickens? A. Yes.

Q. In the middle of the winter you were going to raise chickens, in the middle of the winter? A. That's the way they put it to me, and Mrs. Vettor wants to tell the truth she could sit up and tell the truth.

Q. Did you have any experience in raising chickens? A. No, they was going to bring chickens, and whether they were going to get some one to raise them or not I don't know; I was supposed to drive.

Q. You were to get a hundred dollars a week? A. That's what they said they would do.

Q. They turned over some $225 to you to buy a car? A. They bought it for $250; they bought that car, yes.

Q. Were they present when you bought the car? A. This (Page 195) Tony was there and paid for that car.

Q. Took it in your name? A. They said, "You can have the car and go back and forth."

Q. They were financing everything? A. He was financing; the man that was the witness was here yesterday and said I gave him the money, he is not telling the truth.

Q. In other words, the Government witnesses, so far as they testified against you, were not telling the truth? A.

The man that was here yesterday where the car was bought and said that I handed him the money, he is not telling the truth.

Q. Have you told the whole truth here? A. I am telling the truth.

Q. When you went up to rent the house you paid the money to Mrs. Colacarro and Mrs. Shannon? A. Ten dollars deposit I did.

Q. You paid her $75 for three months' rent, is that right? A. The $75 was supposed to be in advance for that lease.

Q. For three months' rent? A. Yes, that was handed to me by John.

The Court: Where did you get that money?

The Witness: John give it to me to pay it.

Q. And then you paid $25 per month? A. Yes.

Q. To Mrs. Colacarro, didn't you? A. $25 per month, (Page 196) yes.

Q. The money was turned over to Mrs. Colacarro at her home, is that right? Tony wasn't there at that time, was he? A. They gave it to me.

Q. No, please answer the question.

The Court: Was Tony there at the time you paid the deposit?

The Witness: Not with me, no; I went there alone.

Q. And you went there later with Mrs. Vettor, didn't you? Did you go there later with Mrs. Vettor? A. I did one time I went with Mrs. Vettor to find out if they had already removed their furniture so I could put up curtains.

Q. Was Tony or John with you when you got this receipt for the coal? A. No.

Q. And Tony or John weren't with you when you went down to the real estate agents' office to get the lease, to

have the lease prepared? A. Well, I didn't go to the office, I got it to Mrs. Colacarro's own home.

The Court: No, Mrs. Shannon said she went down to the real estate office and paid a dollar, I think, to have the lease drawn.

Q. You signed the lease under the name Franzisco Bassilo? A. That's right; this Tony had told me to rent this place.

Q. And you had never heard of that name before? A. No.

(Page 197) Q. Did you think there was anything wrong in using a different name? A. Well, I really didn't know his last name; he was Tony but I didn't know the last name.

Q. Neither name was Frank? A. I knew the name was Tony and John, that's all I knew.

Q. You never questioned that at all? A. No, I didn't give it a thought there was anything wrong.

Q. You remained on the premises from October until January, is that right? A. In the month of October I wasn't even hardly there. I would say December to January.

Q. When did you go up to rent the premises? A. Well, I say November.

Q. Is Mrs. Shannon telling the truth when she says you were there in October to rent the premises? A. Well, I think I gave her the deposit in November.

Q. She is telling an untruth too, is that right? A. No, I don't say that but maybe I can't recall it.

Q. How many times were you there in October, if you can recall? A. I was there couple of times to give her money and pay for the coal.

Q. How many times were you there in November? A. Once.

Q. Once in November. How many times were you there in December? A. Probably once, maybe more; I cannot recall.

Q. To the farm house? A. Oh, to the farm house. I (Page 198) thought you meant——

Q. I am talking about the farm house, not Mrs. Colacarro's. A. That I cannot say how many times, I went back and forth.

Q. Well, how many times were you at the farm house where the still was in October? A. I wouldn't know how many days.

Q. About how many times? A. Probably every other day, or three days.

Q. In the month of October? A. Yes.

Q. And how about the month of November? A. November, same way, just off and on every two or three days I would go there, because I was not living there at the time. I didn't really start going daily until December.

Q. You didn't start going daily until December, is that right? A. That's right.

Q. When were you really first employed by this man to raise chickens at this farm, on what date? A. In November. First they says, "Will you rent the place?" Then November they said, "You go to the place" November 1st, "and get yourself a hundred dollars a week." That was to raise chickens. That's all that I know.

Q. And you got paid a hundred dollars the first week? A. I didn't get nothing; I got paid little now and little then, amounted to $135 and if they was to pay me a hundred dollars a week I should get $665 more which I didn't get.

(Page 199) Q. Over what period of time did you get this $135? A. From November on.

Q. November to January? A. Yes.

Q. Two and a half months? A. "Next week we will pay you, next week we will straighten you out." I never got straightened out. Now, in between this time, as I said, I was arguing that I wanted to get paid or I was going to leave, they said, "Stay and like it." Mrs. Vettor was present at the time that I said this and she was afraid then when they said stay and like it.

Jack Kilstein, for Defendant—Direct.

Q. You didn't do any other work during this time? A. No, no other work. I brought coal and they would load that car out and say, "Drive it out."

Q. Did you go to buy coal yourself? A. I went over on couple of occasions but I never paid for it, they would meet their own bills.

Q. And you also maintained your home in Elizabeth? A. I did, because I intend to bring it up if I got paid I could drop and leave.

Q. But you still maintained your home in Elizabeth all during this period? A. I did.

Q. How many rooms? A. Five.

Q. Did I understand you to say on direct examination that you did carry cans of alcohol in the car? A. I did carry alcohol I admit.

(Page 200) Q. You took those to Newark?

The Court: We will recess now until 2 o'clock.

Mr. Simandl: I wonder if I might ask your Honor in the interest of Dr. Kilstein, who is Resident Physician of Rahway Hospital, whose testimony will take about one minute——

The Court: Yes. Step down.

(Page 200) JACK KILSTEIN, called and sworn on behalf of the defendant Bozza, testified as follows:

Direct examination by Mr. Simandl:

Q. Dr. Kilstein, you are connected with the Rahway Hospital? A. Yes, sir.

Q. As its Resident Physician? A. Yes, sir.

Q. And were you such in January of 1945? A. Yes, sir.

Q. And on or about January 18 or January 7th, rather, did you have occasion to see Mrs. Vettor? A. It was January 11.

Q. January 11, was it? A. Yes.

Q. And did you see her immediately after her admission? A. Yes, sir.

Q. Very quickly after her admission? A. Yes.

Q. What was her condition? A. I diagnosed the condition as being an alcoholic coma.

Q. She was actually in coma? A. Yes, sir.

(Page 201) Q. That's all.

Cross examination by Mr. Tyne:

Q. Just a minute. Are you a licensed physician of the State of New Jersey? A. No, sir.

The Court: No, he is Resident Physician at the hospital. I will accept it.

Q. May I see your record? When did you graduate from school, Doctor? A. November, 1943.

Q. Where does it state on the record that she was in a coma? A. Impression here—alcoholic coma.

Q. Well, coma is a state of unconsciousness, isn't it? A. That's right.

Q. Did you hear the witness testify that she walked out of the house?

The Court: Well, now, the doctor is testifying in his own behalf, he doesn't have to qualify what any other witness testified.

Q. You are just talking as to impression? A. That was my impression.

Q. She was asleep when you examined her? A. I couldn't wake her up.

Q. Well, do you distinguish between a person being asleep and a person being in a state of unconsciousness? A. Yes, sir.

Q. Well, what is the distinction in your mind between (Page 202) a person who is in a state of unconsciousness

and in a state of sleep? A. Well, there is such a thing as being put to sleep by hypnosis.

The Court: How about the difference between what you discovered here and sleep; was that an alcoholic coma or was that a condition of sleep?

The Witness: I considered this to be in a condition of alcoholic coma.

The Court: And that is a condition where the subject is incapable of appreciating things going around him, is that right?

The Witness: That's right.

The Court: As a result of excessive indulgence in alcohol?

The Witness: Yes, sir.

The Court: In other words, she was what has been commonly referred to as drunk?

The Witness: That's right, sir.

By Mr. Tyne:

Q. Just one other question. Did she walk into the hospital? A. I don't know, sir.

Q. Does that show on your record? A. That doesn't show on the record.

Q. Were you present when she was admitted? A. No, sir; I found the patient there.

(Page 203) Q. How long after admission did you see her? A. A few minutes.

Q. A few minutes? A. Yes, sir.

Q. Well, where was she when you first saw her? A. She was in bed.

Q. Fully undressed? A. Yes, sir.

Q. They cleaned her up before they put her to bed, didn't they?

Mr. Simandl: How does he know?

Mr. Tyne: I won't press it.

The Court: All right.

Nicholas Chirichillo, Recalled—Cross.

Mr. Simandl: May I excuse the doctor?

Mr. Tyne: Yes, you may excuse the doctor.

The Court: We will recess now until 2 o'clock. The jury will be excused first.

(Noon Recess.)

AFTERNOON SESSION.

NICHOLAS CHIRICHILLO resumed the stand.

Cross examination (Continued) by Mr. Tyne:

Q. All during the period of time that you were at the still premises you knew that the still equipment was there, didn't you? A. I did, after they had it up; but before they had it up I didn't even know it was there.

Q. From the time that you were there until the time of the raid you never notified anybody of the presence of the (Page 204) still on the premises? A. I don't notify nobody, it is true.

Q. When you were questioned by one of the agents you gave the agent certain information concerning a description of John, did you not? A. Yes.

Q. And you described him as a short, stocky man about 5'6" high, is that right? A. About that.

Q. That is about the same height as this man here?

Mr. Simandl: Oh now, I object to that, if the Court please, and ask that it be disregarded.

The Court: I will direct that the jury disregard it, there will be no comparison.

Q. At that time you didn't tell the agent that you were going to operate the car which you purchased to transport chickens, did you? A. No, I did not.

Q. You told him that you were going to transport or you were hired to transport some stuff twice a week from the— A. When the car was bought it was for me to transport stuff; I didn't tell the agent what it was supposed to be.

Q. Immediately after you bought the car John and yourself drove to the still premises on Cleveland Avenue, didn't you? A. Not in the Ford.

Q. In what car did you go to the still premises? A. In his own Chevvy.

Q. How long had you known John and Tony before they (Page 205) engaged you? A. I hadn't known them at all. Being that I had spoken in the corner amongst a lot of men that I was out of a job, that I didn't have any money for the upkeep of my children to pay into the probation.

Q. How many times during the month of October did you see them? A. I seen them once a month.

Q. Did you see them in November too? A. In November once.

Q. And in December? A. December, yes.

Q. And in January? A. No.

Q. The still equipment was seized on January 19, 1945, isn't that so? A. Well, that's the time that I was in Rahway and I got picked up, at least I got arrested and I don't know what happened after that.

Q. It was about a week before that that you were taking Ellen Vettor to the doctor's? A. To the doctor's is right.

Q. In transporting the alcohol which was put into the car and which was taken to Newark, were these five-gallon cans in which the alcohol was put? A. Those cans were filled, not in my presence, they were filled and half the time they would be down in that kitchen and I would drive the car up and it would be put in the car.

Q. In other words, they were taken out of the kitchen of the still premises and put in your car? A. That's right.

Q. And you drove the car to Newark? A. Right.

Nicholas Chirichillo, Recalled—Cross.

(Page 206) Q. With Ellen Vettor? A. At times, and at times she was not with me.

Q. At times she was not with you. Did you ever drive to Newark alone? A. I did.

Q. Most times you were in the company of Ellen Vettor and anyone else? A. No.

Q. After you paid the $75 at the time the place was rented to you, you paid the rent monthly, is that so thereafter? A. After they were behind there one time and they gave me money to pay; I had no money of my own, I couldn't h paid it.

Q. Did you pick up the sugar that you transported to the still premises in Newark?

The Court: I don't care where he picked it up, he admits that he took the stuff there.

Mr. Tyne: I think I have no further questions, sir.

Cross examination by Mr. Simandl:

Q. May I ask two questions, your Honor? Mr. Chirichillo, when she entered the Rahway Hospital you were present, weren't you? A. Yes.

Q. And how did they take her in the hospital? A. They took one of these cots on wheels and moved her to the elevator.

Q. They took her on a sort of stretcher on wheels? A. Yes, to the elevator and brought her upstairs.

(Page 207) Q. Now, prior to the time, some time in April, that you were brought into this courtroom to plead, did you know Bozza? A. No.

Q. Or meet him before? A. No.

Q. Did he ever come to this place in Cleveland Avenue or out at Woodridge? A. Well, I hadn't seen him there if he had been there at times; but he was a person I hadn't seen outside of John and Tony.

Q. That's all.

Charles dePietro, for Government—Direct.

By Mr. Cassini:

Q. Did you have any money when you went over and made this lease with these people? A. No, I hadn't.

Q. Of your own? A. No, I hadn't, I didn't have no money.

Q. How long have you been out of employment? A. I had been out of employment because I had a toe cut and I was out of employment a long time; I had no money.

Q. All right, that's all.

(Page 208) Mr. Tyne: Just one question. Mr. dePietro.

CHARLES DEPIETRO, called in rebuttal on behalf of the Government, testified as follows:

Direct examination by Mr. Tyne:

Q. Mr. dePietro, did Chirichillo make this statement to you, "I went in and took out seven gallon cans of alcohol and put them in the back of my car"?

Mr. Simandl: Now, may it appear, if the Court please, that it is only binding on——

The Court: On Chirichillo.

A. Yes, he did.

Q. And did he make this statement that, "John told me to follow him"? A. Yes, he did.

Q. And did he further make this statement, "From then on I was to take between seven and nine gallon cans of alcohol from the still to Newark"?

Mr. Cassini: May it please your Honor, I don't believe this is proper re-direct examination.

The Court: It is rebuttal.

Mr. Cassini: I don't believe it is rebuttal. We have been all over this.

The Court: Well, it is rebuttal in so far as statements made by Chirichillo are concerned in which he says that he filled the cans, which is denied, so that would be a rebuttal statement made to this wit-(Page 209)ness by Chirichillo.

Mr. Cassini: That he filled the cans?

The Court: Filled the cans and loaded them into the car.

Q. What is your answer to that?

The Court: He has already answered it. Anything further?

Q. Was he asked this question and did he give this answer, "How many men were working in this still? "A. When it was running they had two men running there three days a week"? A. Yes, that's right.

Q. Did he tell you in answer to description of John and Toney, "John is about 5'6", solid build, about 185 pounds, about 45 years of age"?

Mr. Simandl: I object, if the Court please, that has already been admitted and there was a reference made that was stricken out.

The Court: No, but he has indicated a description which doesn't seem to fit the one he has now given. I shall allow it.

Mr. Cassini: Your Honor will allow me an exception.

(Which exception is hereby allowed and sealed accordingly.)

THOMAS J. MEANEY

(Sealed).

Colloquy.

(Page 210) The Court: Without reference to anybody by contrast, simply the statement as made.

Mr. Cassini: I want to object to it, may it please your Honor, on the ground that it is not proper rebuttal.

The Court: It would seem to contradict testimony which your client gave.

Mr. Cassini: My client specifically said that and gave a description of the individual on the stand. Now there is nothing in this statement that he has given now that tends to deny the description that he gave.

The Court: The description that he gave was that he was short and thin, now this is not short and thin.

Mr. Simandl: Judge, may I respectfully——

The Court: Well, now, do you want me to say that his testimony was in comparison to John Bozza?

Mr. Simandl: No, I don't ask you to say anything, I merely ask your Honor to listen to me for one moment. I believe he said that the short, thin man's name was Tony.

The Court: No, that was the tall, thin man, tall, thin man named Tony, and then he described John.

Mr. Simandl: As a man who was darker than Bozza.

The Court: As a man who was darker than Bozza and not as——

(Page 211) Mr. Simandl: Heavy, or something of that sort.

The Court: Husky or heavy, yes, that is why I didn't want to refer to Bozza, but that was the testimony definitely. Now, go ahead.

Mr. Tyne: I didn't read the additional statement, your Honor.

The Court: No, let's get through with this thing, we have been two days on it. Anything further now?

Mr. Tyne: That's all.

The Court: Now, there are further motions to be made, ladies and gentlemen of the jury, by counsel for the defense which they are entitled to make and which it is their duty to make and it refers to the law, so I will excuse you for the time being.

(Jury withdrew.)

The Court: Now, Mr. Ratner.

Mr. Ratner: Your Honor please, I respectfully at this time renew my motion for an acquittal on all five counts under the indictment.

The Court: All right. I feel in so far as Peter Milito is concerned that there could be nothing further on which the jury could act than what might be termed well-grounded suspicion, which would not be enough in law to permit me to submit the case to them. I shall therefore grant the motion and direct a verdict of acquittal so (Page 212) far as Peter Milito is concerned.

Mr. Ratner: Thank you very much. May I be excused?

The Court: You may.

Mr. Simandl: If the Court please, I renew my motion at this time for a directed verdict of acquittal on each of the separate counts of the indictment as to Bozza.

The Court: I shall deny your motion, you may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

THOMAS F. MEANEY.

(Sealed)

Mr. Ratner: May the defendant Milito be discharged?

The Court: Is he on any other charge?

Mr. Ratner: No, no.

The Court: All right.

Mr. Cassini: I renew my motion——

The Court: Wait a minute. The jury must return its verdict first.

Mr. Cassini: I renew my motion with respect to Nicholas Chirichillo.

The Court: I shall deny your motion; you may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

(Page 213) THOMAS F. MEANEY

(Sealed)

The Court: You may send for the jury. Wait a minute. How long do you want for summation? Have you any requests for charge? How long do you want for summation and in what order do you want to go?

(Discussion off the record as to time for summation.)

(Proceedings resumed in presence of the jury.)

(Mr. Cassini summed up on behalf of the defendant Nicholas Chirichillo.)

Mr. Ratner: Does your Honor want to dispose of my motion now?

The Court: No, I have disposed of your motion. You do not have to wait. I told you you could go but your client will stay here.

(Mr. Simandl summed up on behalf of the defendant Bozza.)

(Mr. Tyne summed up on behalf of the Government.)

(Page 214)

Charge of the Court.

Ladies and gentlemen of the jury:

The defendants, Nicholas Chirichillo, Zachary Bozza and Peter Milito have been indicted by a grand jury of the United States, in and for the District of New Jersey, on charges which are contained in the five remaining counts of an indictment. In the first count these three men are charged with engaging in and carrying on the business of distiller and distilling spirits.

In the second count they are charged, all three of them, with having in their possession and custody a still, and failing and neglecting to register the same as required by law.

In the third count they are charged, all three of them, with making and fermenting unlawfully about 600 gallons of mash fit and intended for distillation and for the production of spirits or alcohol.

The fourth count charges them with concealing a certain quantity of distilled spirits for the purpose of evading the tax; and the fifth count charges Chirichillo and Bozza with transporting distilled spirits for which the tax had not been paid, and for the purpose of evading the payment of such tax.

Now, in so far as Peter Milito is concerned, a motion was made to direct a verdict of not guilty for him and I (Page 215) do so direct you to return a verdict of not guilty. That, of course, will not affect your determination in so far as the other two are concerned in any way one way or the other. Milito is simply removed from the case and you will return a verdict of not guilty.

That leaves the indictment standing against Nicholas Chirichillo and Zachary Bozza, also known as John Bozza and in the indictment as it stands against them there are five counts.

At the outset let me tell you that the mere fact that an indictment has been returned is not to be considered by you in any way as evidence of the truth of the charge con-

tained in that indictment or as evidence of guilt on the part of these defendants. It is simply an outlining of the charge so that these defendants may know what they must meet and so that you may know that which is charged against them, but it has no probative value of any kind whatsoever.

I have outlined to you the five counts and I will tell you that in so far as each of these defendant is concerned and that with reference to all five of the counts, they are presumed to be innocent until proven guilty beyond a reasonable doubt; and the burden of proving their guilt beyond a reasonable doubt is upon the government, and that burden never shifts. The government bears the burden of proving every element of each count to your satisfaction (Page 216) beyond a reasonable doubt before you would be justified in returning a verdict of guilty on any of the counts involved. This presumption of innocence is not just an idle thing; it is a very definite thing in our law; in our system of jurisprudence the Founding Fathers wisely decided that justice and humanity required the establishment of a principle wherein men who were charged with crime would be presumed to be innocent until proven guilty beyond a reasonable doubt; and the reason for that you can very easily see, because it is easy enough to make a charge, and you wouldn't have to strain your imaginations very much to find different instances where it would be impossible for a person charged with crime affirmatively to prove his or her innocence. Available evidence might be lost or there might be a series of circumstances pointing to the individual which he could not possibly meet although he was completely innocent; and with the God-given wisdom that characterized their activities in relation to the establishment of this country, our Founding Fathers established that presumption; and that presumption remains with the defendants all the way through the trial and can be taken from them only in the event that you are satisfied by the evidence adduced by the government beyond a reasonable doubt that they are guilty.

Now, a reasonable doubt is not anything very mystic and mysterious; it is the doubt of a human mind functioning (Page 217) rationally; it is the doubt that might be begotten from your consideration and comparison of the evidence which would arise if your minds were operating as normally they do in the ordinary conduct of your daily business. It has been defined as that state of the case which, after entire comparison and consideration of all the evidence, leaves your minds in a condition where you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge. If you have such a reasonable doubt about the guilt of either of these defendants on any of the counts, for such count and for such defendant you must give the benefit of the doubt to such defendant. So that any reasonable doubt that you may have as to any element of any count charged against them must be resolved by you in favor of that person for whom you have a reasonable doubt. But the defendants are entitled to the benefit only of a reasonable doubt. They are not entitled to the benefit of a fantastic or remote doubt or a doubt based upon the fear that conceivably you might make a mistake, or a doubt based upon an unwillingness to convict a fellow creature; because you are here to do a courageous, just job, and you cannot be weighed by any feelings of timidity; you must be weighed by the justice of the situation, and you must meet the duty that has been placed upon you courageously. So that in determining this question of reasonable doubt, remember (Page 218) that it is a reasonable doubt which must be resolved in favor of the defendants, and no other kind of a doubt.

There has been testimony given in this case by a person who was indicted with these two defendants, but who is not on trial and who might be termed an accomplice; and I charge you that the testimony of an accomplice must be very carefully scrutinized and must be accepted by you only after weighty consideration; but it may be the basis of a conviction should you be convinced of its truth, and while

corroboration is very desirable it is not absolutely required. And the testimony of an accomplice, if you believe it, and if it be such as to convince you beyond a reasonable doubt of the truth of the charge is sufficient upon which to base a verdict of guilty.

It is needless to say that mere suspicions or speculations in possibilities or probabilities would not be enough upon which to base any verdict of guilty. It would be intolerable and screamingly unfair to suspect or guess anybody into jail. You have got to be satisfied by the evidence adduced before you beyond a reasonable doubt of the guilt of the accused before you would be entitled to return a verdict of guilty against any accused on any charge.

In determining and weighing the evidence you may not base one presumption upon another presumption. You may base a presumption on facts which are proven, but you may (Page 219) not base a presumption upon another presumption or draw an inference from another inference, because by that process you could arrive at practically any conceivable consideration.

The evidence adduced before you, before you would be justified in returning a verdict of guilty, must be such as to exclude every reasonable hypothesis but that of guilt. If that evidence does not exclude every reasonable hypothesis of innocence, you must then acquit; and if two hypotheses may be drawn from the same facts, one consistent with guilt and one consistent with innocence, you must adopt the one consistent with innocence; because American justice is very jealous of the rights of people charged with crime. We boast about that, and we boast about it properly. That does not mean that we have got to be sentimental; it does mean that we must be very careful of all of the rights of defendants.

During the course of the trial, counsel, as I have indicated, in the full performance of their duty, have made certain motions and have made certain objections, these

being based upon the law, as they saw it, and it then became the duty of the court to make a ruling. You must not permit yourselves to be affected in any way by any ruling which the court made, because those rulings were made on questions of law with which at the time you were not concerned. So that (Page 220) you must not conclude that that activity of counsel indicates anything except the fact that counsel was properly within his rights in protecting or attempting to protect the rights of his client.

You, ladies and gentlemen of the jury, are the sole judges of the facts. The whole question of the credibility of witnesses, the whole question of the weight that you will give to any testimony adduced here or to any evidence brought out before you, is for you to determine. You are to say which witnesses you will believe; you are to say what testimony of any witness you will believe, and you to weigh it and appraise it and give to it that value which you in your conscience think it is entitled to. If, during the course of the trial, either counsel or the court has attempted to recall testimony that varies from your recollection of the testimony as it actually was given, it is your recollection and not that of the court or counsel which must prevail. You have the right to ask yourselves what interest any witness may have had in testifying as that witness did. You may ask yourselves whether or not the witness Vettor was led by any expectation or hope of reward to testify as she did. She said that she was not threatened nor were any promises made to her; but you still may ask yourselves whether her testimony was affected by any hope that she may have had.

(Page 221) You have a right to ask yourselves whether her testimony was inherently credible, and if you feel that she lied in any particular you have the right to disregard all of her testimony. But you have a selective right; you may believe that which you think to be true and disregard that which you think to be false; but if a person lies on the stand, you have a right to consider that all of the testi-

mony is a lie, if you so feel. On the other hand, you may ask yourselves what interest any other witness who took the stand had. Chirichillo is a defendant. Certainly he has an interest in the outcome of this trial, and you may ask yourselves whether that interest in the outcome of the trial is sufficiently potent and driving to lead him to color the facts or to lie. You have the right to consider the inherent nature of his testimony and ask whether it is the type of testimony that is worthy of belief; whether it is consistent; whether it fits in with the ordinary facts of life, or whether it is tailored.

The defendant Bozza did not choose to take the stand. That is his privilege. He has the right to stand upon his plea of not guilty; he has pleaded not guilty and that remains a representation of his throughout the trial. There is no obligation on him to take the stand, and if he chooses he is perfectly within his rights not to take the stand, and you will draw no inferences of any kind about (Page 222) his failure to take the stand.

In determining the guilt or innocence of these defendants, ladies and gentlemen of the jury, you will, of course, consult with each other when you go into the jury room. Don't go in with your minds closed. Remember you are a deliberative body and that you are to pass upon the question of the responsibility of these defendants and conduct yourselves as reasonable persons. Exchange your ideas; compare notes and then when you have discussed the matter let your conscience be your guide and apply the rules of law as I give them to you to the facts as you determine them. You will pass upon the five counts of the indictment separately and you will pass upon them individually for each of the defendants so that you will ask yourselves whether you are satisfied beyond a reasonable doubt of the guilt of the accused Chirichillo on each of the five counts. Then you will ask yourselves whether or not you are satisfied beyond a reasonable doubt of the guilt of the defendant Bozza on each of the five counts, considering each one sepa-

rately, and if necessary return a separate verdict on each count. A general verdict of guilty would mean a verdict of guilty for that particular defendant on all the counts, and a general verdict of not guilty would mean a verdict of not guilty on all of the counts; but if you feel that there is a distinction, that a defendant may (Page 223) be guilty on one count and not the others, you will so particularize and specify. And remember that the general rules I give you about the general principles of law apply to each count, to the proving of every element of each of these counts.

The verdict which you will return, of course, must not be the result of bias or prejudice or sympathy. If you are biased one way or the other; if you feel a prejudice against either of these defendants; or if you feel unduly sympathetic with them and allow that to affect your determination, you are doing a grave injustice and you are failing utterly and completely in carrying out your sworn duty. I have told you to meet your task courageously, and I know that you will do it and you cannot meet it courageously if you permit yourself to be affected by sympathy or by prejudice.

There is a provision of the law which I shall read to you which you will keep in mind as you consider the various elements which you are to determine, and that provision reads as follows:

> "Whoever directly commits any act constituting an offense defined in any law or the United States or aids, abets, counsels, commands, induces or procures its commission is a principal."

So that any person who would effectively and knowingly (Page 224) aid in or abet or counsel or induce the commission of a crime is chargeable as a principal.

Counsel for the defendant Bozza has requested me to charge certain principles of law. The first I feel that I have charged sufficiently and the second. I feel that I have charged the third sufficiently, but I shall just add that the

presumption of innocence must be kept in your minds with respect to every factor of every charge.

The fourth I feel that I have charged sufficiently. The fifth. The sixth I shall charge you in this language.

> "A reasonable doubt may be engendered by lack of evidence as well as by the presence of evidence; and if the government has failed to produce evidence sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt, he is entitled to an acquittal even though that doubt may be engendered merely by the lack of production of evidence."

The seventh I feel I have charged sufficiently. The eighth and ninth I feel I have charged sufficiently. The tenth I will charge in this way:

> "There was certain evidence adduced in this trial which at the time when it was introduced I indicated would be admissible only against one defendant, for instance certain statements that were made by one of the defendants; I remarked at the time that they would be admissible only (Page 225) against that defendant and they may not be used against any other defendant."

Of course, in each individual case you will weigh the guilt or innocence from the evidence admitted against that particular individual, not any evidence admitted against anybody else.

The eleventh I feel I have charged sufficiently.

The twelfth I feel I have covered, but I shall repeat it in this language: That testimony of conversations were introduced between persons when the defendant Bozza was not present. Of course, no responsibility could attach to him because of those conversations, nor may they be used as evidence against him. They can be used only against the persons making the statements.

Charge of the Court.

The thirteenth I feel I have charged sufficiently; the fourteenth and the fifteenth, and the sixteenth.

So far as the seventeenth request to charge is concerned, I shall charge you that mere knowledge on the part of a defendant that a crime is being committed in certain premises by someone is not sufficient of itself, standing alone, to find that defendant guilty. If mere knowledge of the happening of an offense or a crime was all you could infer logically and properly from the evidence, then of course that would not be a proper basis for a conviction.

(Page 226) As far as the eighteenth is concerned, I shall charge you that in so far as the defendant Bozza is concerned, if you find that he was merely an underling, serving at the beck and call of an employer and nothing more than that would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal.

For the nineteenth request I shall say that the possession of a still requiring registry involves custody and control in the person charged with its possession; and before you would be justified in returning a verdict of guilty of that count, you would have to find that the person whose matter you are considering actually had custody and control of the still or that he aided and abetted with knowledge, in the possession and custody and control of the still.

I feel that I have covered the twentieth in the statement just made, that Bozza, if he were simply an underling and at the beck of call of Chirichillo and was nothing beyond that, would not be guilty of the second count. But if you find that other facts existed, and that he effectively had the responsible control and possession of the still or that he aided and abetted, you would be justified in returning a verdict of guilty, provided you (Page 227) are satisfied of that beyond a reasonable doubt.

I have already charged that mere knowledge is not sufficient to indicate guilt of the charge contained, in so

far as the count concerning making the mash is concerned. Of course, before you can find anybody guilty of that, he must be satisfied beyond a reasonable doubt that he actually participated or aided and abetted in the making of the mash.

I shall charge you furthermore, that the mere presence of a small quantity of alcohol at the still, standing alone, and of itself, does not conform to a description of concealment such as would bring the act within the operation of the statute, but it is a factor which you may consider with other circumstances; and if that factor, with other circumstances, satisfies you beyond a reasonable doubt that these defendants or either of them did conceal these spirits, you would be justified in returning a verdict of guilty as to such defendant.

I think I have charged the twenty-fourth charge in saying that you must find the e is some active participation or aiding and abetting in the concealment before you would be justified in finding as a fact that there was a participation in the concealment by any one of the defendants.

To the statement that mere knowledge of the committing of an offense is not enough to indicate participation, I shall add that even approval thereof does not of itself constitute such participation as would indicate responsibil- (Page 228) ity for the crime.

I shall charge the twenty-sixth this way: Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abetter the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction.

I have pointed out to you the fact that the witness Ellen Vettor had been indicted and this indictment was not

brought to trial and that is a consideration which you may keep in mind when you weigh the credibility which you will give to her testimony. I have already indicated that the scrutiny of the testimony of such person as an accomplice must be careful, and that the testimony must be accepted with reluctance; but if it convinces you beyond a reasonable doubt it is valid and proper evidence for you to consider.

I shall charge you that mere presence of a defendant at or near the place where the still was allegedly found, even unexplained or even under suspicious circumstances, is not sufficient, in itself, on which to base a conviction. (Page 229) Mere association by a defendant with another of the defendants, even unexplained, is not of itself enough to warrant conviction.

There is evidence that the witness Ellen Vettor drank quantities of liquor during the time that she says she was living in the house where a still was operated. You have a right to take that circumstance into consideration concerning the accuracy of her recollection of what took place and her identification of those whom she has mentioned and identified.

That covers the requests to charge of the defendant and in so far as they are concerned, other than as I have charged them, I refuse to charge them.

Now, I have outlined to you, ladies and gentlemen of the jury, the principles of law which in the main must affect you and which you must apply to the facts as you determine them. The evidence in this trial so far as Chirichillo is concerned, consists of circumstances of making of the lease, the using of the wrong name, of his actually being there, the admission that he transported these cans, and the whole series of circumstances which you will recall. From that you must determine what are the facts. There has been evidence which he supported that there was a still in this house, and as to that still there is no evidence that it was an authorized still; so that so far as that is concerned, (Page 230) it would seem that it is uncontroverted that a

still was there, an illegal still, and there is certainly uncontroverted evidence that some hundreds of gallons of sugar mash was there; that there were 100 pound bags of sugar, and that coal was carted in there, and that cans were carted out. All those facts you will recall.

The witness Vettor has testified as to what she saw there and she has testified that she saw John Bozza there three days a week. On cross examination it was brought out that she identified or first learned of Bozza's name when she saw the name attached to a picture which she identified as the "John" who had been there at least three days a week, out of at least fifty-five pictures which were shown her. There is no evidence that just one picture was shown her, but she says that at least fifty-five were shown her and that out of those fifty-five she picked out this man who she says was there three days a week. On the stand here she indicated that Bozza was the man who was at that still three days a week and she identified him here in court. You are to ask yourselves whether that is a credible identification. There has been contradictory testimony and there have been contradictory assertions about the condition of this woman. My recollection of Chirichillo's testimony is that so long as he was there he limited her to a certain amount of drink a day and that she was not (Page 231) while he was there, drunk. She herself says that when she could steal it she did get drunk. So that you have testimony that at least while Chirichillo was there—and he says he was there a great deal of the time with her—she was not drunk. The mere fact that she was living in agonizingly bad circumstances and under loathsome circumstances does not of itself stamp her testimony as perjury. It is a matter which you may consider and when her statements are denied by Chirichillo you may ask yourselves what motive she had for testifying as she did, and what motive Mr. Chirichillo had for denying it. You may ask yourselves whether you believe Chirichillo's statement that he was afraid of this John, but that he wishes he could get him

now, he would hand him over to the government, although for two or three months when he was guarding this alcohol he didn't, as a matter of fact, hand him over to the government and claim the protection he says now he can so safely rely on.

All of these questions you will consider; all of the testimony you will weigh and try to arrive at the truth of this situation. The government of the United States does not ask you for a conviction of anybody unless it is justified and warranted, unless it is based upon the legal principles which are the basis of our liberty. These two defendants stand here before the bar of justice and (Page 232) they have certain rights which I have outlined to you, and they are entitled to the full exercise of those rights, and they are entitled to the protection which those rights give them; and those rights may not be taken from them. And the mere fact that an indictment has been brought against them does not mean a thing so far as proof is concerned or so far as their rights are concerned. They have those rights and they remain with them all the way through this trial. And the government of the United States, while it has, through a grand jury, brought this charge, insists that you be jealous of the rights of the very people whom it charges, and it says that an unwarranted sacrifice of those two men would be a grave injustice. But it also says this: The government of the United States has its rights too. The government of the United States is not any mystic, remote thing; this country of ours is you and I and one hundred and thirty-four million other people trying to live in peace and amity and under law. That's all it is; and that government is entitled to protection too. Remember that while an unwarranted sacrifice of anybody for the might of the United States government is a threat to its continuance, remember, I say, that unpunished crime is also a threat to the continuance of this government; and while you consider and jealously consider the rights of the defendants, never for one moment must the rights of the

people of the United States (Page 233) be sacrificed. Don't sacrifice anybody's rights. Justice can be done in this case and in any other criminal case without the sacrifice of the rights of anybody. If you believe that the government has not borne its burden of proving the guilt of these defendants beyond a reasonable doubt, it is your bounden duty to return a verdict of not guilty or else you will be faithless to your trust. If you believe the government of the United States has proven the guilt of these defendants beyond a reasonable doubt and you don't return a verdict of guilty, then you have failed most miserably in the primary function which is yours as citizens of this country.

It is not an easy task at times to weigh the respective rights of parties to a controversy. There is a controversy here with the parties being on the one side the United States of America, and on the other side Nicholas Chirichillo and Zachary Bozza, known as John Bozza. It is not, as I say, easy at times to arrive at a just and true verdict, but the solemn obligation is yours to meet the task that has been placed upon you and to meet it fairly and squarely, courageously and honestly.

Let me in conclusion call to your minds something that happened yesterday. You took an oath and you called upon the living God to witness, and you said that you would a true verdict render according to the evidence (Page 234) so help you God. No words of mine can explain what you have got to do more aptly, more tersely or more sententiously than that.

Don't weigh a poor bedraggled female; you are not trying her. We are here only to see whether she is telling the truth or not. When you weig' these men, weigh them to see whether they are telling the truth or not. Get the truth. Let the all-pervading and almight truth be arrived at, and when you are satisfied in your minds and hearts and consciences that you have determined the truth, return a verdict which measures up to and squares with that truth.

Any then no one may quarrel with your verdict, no matter what it may be.

Mr. Simandl: I ask an exception to your Honor's refusal to charge as requested.

The Court: As to number 1?

Mr. Simandl: I didn't follow them all the way through but I want to take an exception to what your Honor said in modification or substitution in each instance. I don't recall that your Honor charged in the language——

The Court: Twice I did.

Mr. Simandl: I was going to say except—otherwise I think your Honor chose either to reproduce it within his general charge or after he had read the request to (Page 235) substitute——

The Court: Other language.

Mr. Simandl: Other language. I would like to take an exception to what your Honor said in substitution.

The Court: You are taking exception to my refusal to charge your requests as worded by you.

Mr. Simandl: And also to what your Honor said in substitution.

The Court: Well, if you are going to take an exception that way, you must specify. You may take a general exception to my refusal to charge as requested; in the event that there is any specific exception——

Mr. Simandl: I haven't my notes complete. It has been a rather long charge but my recollection is that your Honor did not make clear that the evidence on the part of the government, even if believed in its fullest measure, did not prove anything more than that Bozza was present and that he acted at the beck and call of Chirichillo. That is all that the government proved. If that is the state of the proof, that doesn't establish aiding and abetting, and there are no other facts and circumstances from which the jury might find additional evidence. That is the testimony and they would be searching and groping for something that does not exist and which perhaps they may have gained

the idea does exist by reason of the fact that your Honor (Page 236) says they may take into consideration other circumstances &c. That was not made clear and that is what these requests intended to bring out. So that I take exception to what your Honor said based upon that criticism, sir.

Defendant prays an exception which is hereby allowed and sealed accordingly.

THOMAS F. MEANY.

(Sealed)

Mr. Simandl: I also take exception to your Honor's remarks with respect to when your Honor went on to describe the general system of government which exists in this country and the fact that unpunished crime is a threat to the continuance of government, and then your Honor went on to point out with emphasis "and if you don't return a verdict then you will fail most miserably." It was, I think, after your Honor had stated "and if you find the defendants are guilty * * *."

The Court: You except to that portion of the charge where I used that language?

Mr. Simandl: In that particular area. I believe, if the Court please, that the manner in which your Honor delivered that charge, unconsciously, perhaps, your Honor didn't realize it, but I sitting there did realize it, and the intonation of voice and the striking of the desk and other things, conceivably, may have given the jury the idea that your Honor was arguing for a conviction.

(Page 237) The Court: Ladies and gentlemen of the jury: An exception has been taken to my charge in that counsel says from my zealousness and hitting on the desk I may have conveyed to the jury the fact that I was arguing for the conviction of the defendants. I cannot imagine anything further from a rational interpretation of my actions and remarks, but in the event that by some wild stretch of the imagination that may be true, remember that what

I think about this matter does not weigh with you a particle and I am giving you no intimation of how I feel.

Mr. Simandl: I think, if your Honor please, that the correction has made it worse and I am very sorry that I had to find it my duty to call it to your Honor's attention. I did it most courteously and I don't think——

The Court: Don't you think I have a right to correct any impression that may exist?

Mr. Simandl: Your Honor, the real purpose of this conference at the desk is that it be out of the presenece of the jury.

The Court: It is out of the presence of the jury, but in attempting to make a correction upon your taking an exception to my charge, I have a right to correct it before the jury goes out, which I was doing.

Mr. Simandl: May I put on the record we were talking out of the hearing of the jury and for your Honor (Page 238) to give the jury exactly what we were trying to prevent, that is knowledge of what we were discussing up here, practically places me in a position where I cannot discuss the matter any further.

The Court: That is a ridiculous assertion.

Mr. Simandl: I am sorry. I don't like to be ridiculous. I am trying to be as fair and as humble and as respectful as I can. I feel that I have placed on the record sufficient to indicate exactly what my position is. I take an exception based upon it.

(Which exception is hereby allowed and sealed accordingly.)

THOMAS F. MEANEY.

(Sealed)

Mr. Cassini: Your Honor, I had similar remarks, that is I was taking exception to your charge where you said the unwarranted sacrifice of these men for the life of the United States is a threat to its continuance. Then you said

something about unpunished crime. Now I wish to take exception to the other remarks, because I think Judge Simandl has taken that exception properly.

The Court: Why?

Mr. Cassini: Because he said that it describes the attitude of the court, when he properly criticized its demeanor and the slambanging on the desk, that it would lead the jury to believe that the Judge was practically (Page 239) instructing the jury to bring in a verdict of guilty.

The Court: All right. Now, you are taking exception to that?

Mr. Cassini: Yes. Let me finish; and to that part of the charge in which the court says "Don't weigh a poor bedraggled female"—I didn't get it all—"don't weigh a poor bedraggled female"; to that part of the charge in which he makes that statement.

The Court: Counsel for Chirichillo has taken exception to the court's method of delivering the charge, saying that it would convey to the jury an impression that the court was prosecuting the defendant. Ladies and gentlemen of the jury, I repeat that I cannot see how such a conclusion could be arrived at, but lest there by any doubt in your mind I want you to know that I have an intention of conveying nothing to you except my view of the law, accompanied by such recital of the facts as occur to me, without in any way intimating to you my belief.

(Exception allowed and sealed.)

THOMAS F. MEANEY

(Sealed)

The Court: All right. You may take the case, ladies and gentlemen. Swear a bailiff. The two alternates will be discharged with the thanks of the court. Swear the bailiff.

(Bailiffs sworn.) The jury retired.

(Page 240) Mr. Simandl: I assume you Honor will instruct the Clerk to take the verdict?

The Court: I don't know. I may be here myself, but if not are you satisfied to have the Clerk take the verdict?

Mr. Simandl: Oh, yes. May I ask your Honor, if there is an adverse verdict, whether your Honor will tell me——

The Court: I shall advise the Clerk later.

Mr. Simandl: Will your Honor allow the defendant to be released on bail?

The Court: I shall advise the Clerk later. You will be around here?

Mr. Simandl: I was going to the shore. I haven't been there in about three days.

Mr. Cassini: I thought your Honor would continue the bail.

The Court: I know you did. I may——

Mr. Cassini: I also expect to leave.

The Court: Who is going to be here to protect your client's interests?

Mr. Cassini: The clients will be here. I have been here two days.

The Court: Aren't you going to have someone here?

Mr. Cassini: No.

(Page 241) The Court: Well, I insist that you do. You are going to be here, Mr. Simandl?

Mr. Simandl: I am alone, Judge. But it is all right; I will be here.

The Court: Well, I think counsel certainly should be present when the verdict is returned.

Mr. Simandl: Well, I will be here. I will carry my obligation.

The Court: I mean I really do think so.

(Page 253)

Sentence.

Newark, N. J., Monday, July 23, 1945.

Appearances:

For the Government: CHARLES J. TYNE, Esq.

For the defendant Chirichillo: JOSEPH CASSINI, Esq.

For the defendant Bozza: HAROLD SIMANDL, Esq.

The Court: Chirichillo and Bozza, you were convicted by a jury on a charge connected with a still. There were five counts in the indictment and the jury specifically found each of you guilty on each count. The still which the jury found that you operated was not, to be sure, one of the large stills, and I have disposed of cases heretofore where the capacity of the still was much larger and you might be termed small operators. But this business of operating stills has a double aspect. It has the aspect of being a violation in itself of the law which the government has established in order to procure (Page 254) revenue from alcoholic beverages and the making thereof; in addition to that in these times deprivation of revenue to which the government is entitled is a deprivation of the government from receipts of that which might be applied to the sinews of war. And there is a further aspect of it. I cannot forget the fact that a great many newspapers of this country are finding fault with the various agencies of the government because of the fact that they are sending sugar which is an energy food to the starving peoples of Europe and depriving Americans of the amount to which they have been accustomed. I shall not attempt to pass upon that one way or the other; but it does bring to mind a situation which is existent here and to which not sufficient attention is being paid. And that is that in most of these stills sugar is used for the making of the mash out of which the alcohol is distilled. For instance, in this small still itself,

at the time of the seizure a half a ton of sugar either in mash form or in its natural form as sugar was found in those premises.

Now, how much sugar has been used during the period of full operation I don't know, but we can presume that at least a ton more was used and that a ton and a half of sugar should be diverted from proper use in these times is an aggravation of this offense which I do not intend to overlook.

Chirichillo, you indicated that you didn't know where the sugar came from. I don't believe you. This story (Page 255) that you told about some two men that you never knew coming out of the air and engaging you to run a chicken farm and your finding yourself operating a still is hooey. I don't believe it. I think you know all about it. I think you know where the sugar came from, where the coal came from and everything else, as well as where the alcohol went and how it was disposed of.

Bozza, despite the fact that you resolutely have denied that you participated in it and consistently assert that you know nothing at all about this thing, I think that the jury did not make a mistake when they returned a verdict of guilty and I think you know it. Now, you may, if you choose, keep that knowledge locked up in your breast. I have been known to extend clemency where valid information was given, things that could be checked from other sources and which was instrumental in the breaking down of conspiracy and other criminal practices. I have been known, as I say, to extend clemency to those who were of assistance to the government. I have said before that it is regrettable that we cannot get witnesses for the prosecution of every crime from the ranks of the lawabiding, but such is the nature of the situation that we sometimes must rely upon accomplices.

I have not changed my mind about the practical way of meeting practical situations, each individual situation

to be met individually and on its own surrounding circumstances. (Page 256) You might keep that in mind.

The sentence of the court in your case, Nicholas Chirichillo, on the first count of the indictment is that you be placed in the custody of the Attorney General or his accredited representatives and by him be committed to an appropriate institution for a period of two years. On the second count and the third count and each of these that you be placed in the custody of the Attorney General or his accredited representative and by him be committed to an appropriate institution for a period of two years. On the 4th and 5th count and each of those that you be placed in the custody of the Attorney General of the United States or his accredited representative and by him be committed to an appropriate institution for a period of two years and six months. These sentences to run concurrently.

Bozza, on each of the first, second and third counts of the indictment the sentence of the Court in your case is that you be placed in the custody of the Attorney General of the United States or his accredited representative and by him be committed to an appropriate institution for a period of two years. That on the 4th count and 5th count and each of them you be placed in the custody of the Attorney General of the United States or his accredited representative and by him be committed to an appropriate institution for a period of two years and six months. All of these sentences to run (Page 257) concurrently.

Mr. Simandl: Your Honor please, may I on behalf of Bozza ask your Honor to fix bail as I intend to file notice of appeal.

The Court: I cannot hear you.

Mr. Simandl: I was going to file notice of appeal. I was asking your Honor to fix bail.

The Court: No, I shall not fix bail. I shall deny the motion. I can see no question of fact about which there might be a reasonable hope of reversing the verdict of the jury, and I am convinced that no legal error was made such as would warrant me or tell me to fix bail. If the Circuit Court of Appeals desires so to do it may do so.

Stipulation.

3.40 P.M.

The Court: Gentlemen, in the imposition of sentence this morning of Nicholas Chirichillo and Zachary Bozza it has been called to my attention that there are certain mandatory fines and penalties which I omitted to impose. For the record now minimum mandatory fines and penalties will be imposed.

Mr. Simandl: May, I respectfully record an objection?

The Court: That is why I wanted you to be notified to be here.

Mr. Tyne: May we have it noted on the record that (Page 258) both defendants are present?

The Court: Both defendants are present. All right. I am sorry to have to bring you down here, but I wanted to have you present at that time. All right.

Stipulation.

IT IS HEREBY STIPULATED AND AGREED by and between the United States Attorney for the District of New Jersey, and Harold Simandl, Attorney for the appellant, Zachary Bozza, also known as John Bozza, that the following is a true and accurate account of the itinerary and whereabouts of said appellant during the time which elapsed between the imposition of sentence in open Court by Honorable Thomas F. Meaney at Newark, New Jersey on the morning of July 23, 1945, and his subsequent appearance before said Judge at 3:40 o'clock in the afternoon of the same day, viz:—Immediately after the appellant was sentenced by Honorable Thomas F. Meaney in open Court on the morning of July 23, 1945, a Deputy United States Marshal removed him from the courtroom and took him to the United States Marshal's Detention room in the Post Office Building, Newark, New Jersey, where appellant remained until shortly thereafter, at which time Deputy United States Marshals Kunze and Miller removed him from said Detention room,

and brought him to the Hudson County Jail in Jersey City, New Jersey, a Federal place of detention, and committed him therein to await transportation to the place at which his sentence was to be served. Later, in the afternoon of the same day (to wit, July 23, 1945), Deputies of the United States Marshal's Office appeared at said Hudson County Jail and took appellant from said jail and brought him into the United States District Court before Honorable Thomas F. Meaney at the Post Office Building, Newark, New Jersey at 3:40 o'clock in the afternoon. Judge Meaney then said to appellant:

> "Gentlemen, in the imposition of sentence this morning of Nicholas Chirichillo and Zachary Bozza, it has been called to my attention that there are certain mandatory fines and penalties which I omitted to impose. For the record now minimum mandatory fines and penalties will be imposed."

Deputy United States Marshals then removed appellant from the courtroom and took him to the Hudson County Jail in Jersey City, aforesaid, and committed him therein to await removal to a permanent Federal Correctional Institution.

This stipulation, in lieu of testimony, it is agreed, may be included, annexed, and form a part of the record and proceedings in the above entitled appeal, and may be considered by the United States Circuit Court of Appeals for the Third Circuit as part of the bill of exceptions and record on appeal in said cause.

10/29/45

EDGAR H. ROSSBACH,
United States Attorney for the
District of New Jersey.

HAROLD SIMANDL,
Attorney for Appellant,
Zachary Bozza.

Requests to Charge.

The defendant, Zachary Bozza, respectfully requests the Court to charge the jury the following:

(1) The mere fact that an indictment has been returned against the defendant, Bozza, creates no presumption against him. He is presumed innocent and can only be convicted if the Government produces evidence which satisfies you of his guilt beyond a reasonable doubt. Therefore, during your deliberation, you are not to consider the indictment as evidence against the defendant, or permit it standing by itself to in any manner weigh against him.

(2) The jury are instructed that in criminal cases, guilt must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require of the defendant that he prove himself innocent, but the law places the absolute duty upon the Government to prove the defendant's guilt beyond a reasonable doubt, and unless the Government sustains that burden, the jury must acquit.

(3) The Court instructs the jury that it is your sworn duty to commence the investigation of this case with the presumption that the defendant is innocent of the crime with which he is charged; and it is equally your duty to enter upon the consideration of each fact and circumstance in evidence, having in your minds at all times the presumption that the defendant is innocent, applying to every such fact and circumstance the presumption of innocence; this presumption is not an idle form, but is a fundamental and important part of the law of the land, and you should act upon this presumption throughout your consideration of the evidence unless it shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds to a moral certainty and beyond a reasonable doubt, that the defendant is guilty.

(4) You are instructed that to warrant a conviction in this case the proof must be of such a character as to ex-

clude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to his guilt only, and inconsistent with his innocence. The hypothesis of guilt must flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled with the theory of both innocence and guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence must be adopted.

(5) Reasonable doubt is that state of the case, which, after an entire comparison and consideration of all of the evidence, leaves your minds, as jurors, in that condition that you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge.

(6) A reasonable doubt may be engendered by lack of evidence. If the Government has failed to produce evidence sufficient to satisfy you of the guilt of the defendant beyond a reasonable doubt, he is entitled to an acquittal, even though that doubt may be engendered merely by the lack of production of evidence by the Government.

(7) Mere suspicions or speculation, however strong, are not a sufficient basis for a conviction. Circumstantial evidence must be of such a character as to satisfy the jury of the defendant's guilt, and exclude every other hypothesis to a moral certainty beyond a reasonable doubt, evidence creating mere probability of guilt is not sufficient; much less is evidence which gives rise to a mere suspicion or conjecture of guilt.

(8) If the circumstances admit of two inferences, one that the defendant is innocent and the other that the defendant is guilty, you must adopt the conclusion of innocence and acquit the defendant.

(9) Where the testimony admits of two inferences, one of guilt and one of innocence, it is your duty to adopt that inference which is consistent with innocence.

Requests to Charge.

(10) Each defendant is entitled to have you consider his case separate and apart from the case of the others. In such separate consideration, you are not to consider testimony which you have heard, but which was not admitted against the particular defendant whose case you are then considering. You may consider in his case, only such evidence as was admitted against him, and if, upon such a consideration, you are unable to find that he is guilty beyond a reasonable doubt, you must acquit him.

(11) Each count in the indictment is a separate charge against the defendant named therein. Each defendant is entitled to have you consider each count separate, and in such consideration, you must consider only such evidence as was admitted against him. If you are not able to say that a defendant is proven guilty beyond a reasonable doubt, on a particular count, you must find him not guilty of that count.

(12) There has been presented to you, testimony of conversations had between persons out of the presence of the defendant, Bozza. Such testimony has no binding force whatever as evidence against him, because he was not present. I, therefore, direct you that in your consideration of the evidence in Bozza's case, you must disregard all testimony of conversations held between others not in the presence of the defendant, Bozza.

(13) Though facts and circumstances brought out in the proof of a case, may create a suspicion in the minds of the jury as to the guilt of a defendant, no man is to be convicted of a crime upon the mere suspicion that he committed it.

(14) It is the duty of counsel, in the trial of a criminal case, to object to the admission of testimony which he deems is improper, and even though the Court may disagree with counsel and overrule the objection of counsel,

you, members of the jury, are not to draw any inference adverse to the defendant solely because his counsel objected to evidence which was offered.

(15) The charge against the defendants in each count of the indictment is made up of certain material elements, each and all of which the government must prove beyond a reasonable doubt. If the government fails to prove beyond a reasonable doubt, any one of such material elements, the government's case as to that count fails, and the defendant must be acquitted of that count.

(16) A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment and each count thereof. You are further instructed that throughout the trial, the defendant's plea of not guilty serves as his continuing denial of the evidence offered against him by the prosecution pursuant to its ever present burden of proof.

(17) Mere knowledge on the part of a defendant that a crime is being committed on certain premises by someone, is not sufficient, standing alone, upon which to find that defendant guilty, and if this is all you find is disclosed by the evidence, you must acquit the defendant.

(18) One who merely serves the beck and call of an employer, and nothing more, and who holds no proprietary interest in the still or its product, can not be said to be engaged in the business of a distiller. If this is all you find the proof shows against Bozza, you must acquit him of the First Count.

(19) Possession of a still requiring registry thereof, as provided by the law, under which the second count of the indictment is brought, involves dominion and control over it, with plenary power to dispose of it, in the person charged with possessing it.

(20) It is a defense to the charge in the Second Count, if it appears that Bozza had no real control of the still

but was merely there at Chirichillo's beck and call to do what he ordered him to do, and that he did not have any function or responsibility of controlling and possessing the still. If this is all you find the proof shows against Bozza, you must acquit him of the Second Count.

(21) Even if the defendant knew the still was there, in the possession, custody or control of another, that mere knowledge would not be sufficient to make him guilty of criminal possession, so as to require him to register the still under the law.

(22) With respect to the Third Count, before one can be convicted of making mash as charged in that Count, it must be shown beyond a reasonable doubt that he actually, knowingly, participated in the making of the mash, or knowingly and intentionally procured, commanded, or induced said mash to be made.

(23) In considering the Fourth Count of the indictment, the mere fact that there is testimony that a very small quantity of alcohol was found at the still is not in itself sufficient proof of a concealment of distilled spirits with intent to defraud the United States of tax, as the term concealment is used in the statute upon which the Fourth Count of the indictment is based.

(24) With respect to the Fourth Count, I charge you that the charge of concealment must be supported by evidence beyond a reasonable doubt that the defendant actually took part in or aided or directed a concealment of alcohol or distilled spirits. It requires proof of affirmative action; something more than a mere failure to disclose its presence to the authorities.

(25) Mere knowledge that others are committing an offense against the law and even silent approval thereof, or a failure to inform the authorities that others are about to commit an offense, or are committing it, are circum-

stances which are not sufficient in themselves to prove that a defendant is a party to a crime, or that he is an aider or abettor of said crime.

(26) Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abettor, the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time, he committed such an act, he knew that a criminal transaction was then in progress, and with that knowledge, acted, with an intent that his action should further or assist the criminal transaction.

(27) There is evidence that the witness, Ellen Vettor was arrested for the offense and indicted, but that she has not as yet been brought to trial, and that she may be an accomplice. Such circumstances may be considered by you in determining whether or not she is telling the truth, or whether or not she has colored her testimony in any way.

(28) Accomplices when they give evidence against persons charged as being fellow participants in the commission of the same crime, may be impelled so to do, by motives which will incline them to pervert the truth; and it is your duty to give careful thought and consideration to that question and to examine the matter of the motive of any such accomplice, in the light of all the facts and circumstances. The testimony of an accomplice ought to be viewed with distrust. It is proper to advise you that your scrutiny of the testimony of an accomplice should be especially close, careful and rigid, and if you do not have a full and positive conviction that she is telling the truth, you should discard her testimony.

(29) The motive, interest or bias that a witness has in testifying, is always a proper inquiry that a jury may

make and consider with respect to such witness, in determining what weight, if any, the jury will attach to that witness' testimony.

(30) If you find that any of the witnesses offered by the Government, have wilfully, intentionally testified falsely to any material fact, you have the right to disregard and reject the entire testimony of any such witness.

(31) Mere presence of a defendant at or near the premises where the still was allegedly found, even unexplained, or even under suspicious circumstances, is not sufficient in itself upon which to base a conviction.

(32) The mere association by a defendant with another of the defendants, even unexplained, is not sufficient in itself to warrant a conviction.

(33) There is evidence that the witness, Ellen Vettor constantly drank quantities of liquor during the time that she says she was living at the house where it is charged the still was operated. You have a right to take that circumstance into consideration in determining the accuracy of her recollection of what took place, and her identification of those whom she has mentioned and identified.

(34) The failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him. The jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussion or deliberations of the jury in any manner.

Assignment of Errors.

And now comes Zachary Bozza, defendant-appellant, and says that in the record, proceedings and judgment aforesaid, there is manifest error, and for assignment thereof says that:

(1) The Trial Court erred in denying appellant's motion to direct a verdict of acquittal made at the close of the government's case.

(2) The Trial Court erred in denying appellant's motion to direct a verdict of acquittal made after both sides had rested.

(3) The Trial Court erred in permitting the witness Charles de Pietro to testify in rebuttal on behalf of the government as follows:

> "Q. Did he tell you in answer to description of John and Tony, 'John is about 5'6", solid build, about 185 pounds, about 45 years of age'?
>
> Mr. Simandl: I object, if the Court please, that has already been admitted and there was a reference made that was stricken out.
>
> The Court: No, but he has indicated a description which doesn't seem to fit the one he has now given. I shall allow it.
>
> Mr. Cassini: Your Honor will allow me an exception.
>
> (Which exception is hereby allowed and sealed accordingly.)"

(4) The Trial Court erred in instructing the jury as follows:

> "They are not entitled to the benefit of a fantastic or remote doubt or a doubt based upon the fear that conceivably you might make a mistake, or a doubt based upon an unwillingness to convict a fellow creature; because you are here to do a courageous,

just job, and you cannot be weighed by any feelings of timidity; you must be weighed by the justice of the situation, and you must meet the duty that has been placed upon you courageously. So that in determining this question of reasonable doubt, remember that it is a reasonable doubt which must be resolved in favor of the defendants, and no other kind of a doubt."

(5) The Trial Court erred in instructing the jury as follows:

"You have a right to ask yourselves whether her testimony was inherently credible, and if you feel that she lied in any particular you have the right to disregard all of her testimony. But you have a selective right; you may believe that which you think to be true and disregard that which you think to be false; but if a person lies on the stand, you have a right to consider that all of the testimony is a lie, if you so feel. On the other hand, you may ask yourselves what interest any other witness who took the stand had. Chirichillo is a defendant. Certainly he has an interest in the outcome of this trial, and you may ask yourselves whether that interest in the outcome of the trial is sufficiently potent and driving to lead him to color the facts or to lie. You have the right to consider the inherent nature of his testimony and ask whether it is the type of testimony that is worthy of belief; whether it is consistent; whether it fits in with the ordinary facts of life, or whether it is tailored."

(6) The Trial Court erred in instructing the jury as follows:

"The defendant Bozza did not choose to take the stand. That is his privilege. He has the right to

stand upon his plea of not guilty; he has pleaded not guilty and that remains a representation of his throughout the trial. There is no obligation on him to take the stand, and if he chooses he is perfectly within his rights not to take the stand, and you will draw no inferenees of any kind about his failure to take the stand.

(7) The Trial Court erred in refusing to charge appellant's request No. thirty-five as follows:

"(35) The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

(8) The Trial Court erred in refusing to charge appellant's request No. eighteen as follows:

"(18) One who merely serves the beck and call of an employer, and nothing more, and who holds no proprietary interest in the still or its product, can not be said to be engaged in the business of a distiller. If this is all you find the proof shows against Bozza, you must acquit him of the First Count."

(9) The Trial Court erred in instructing the jury as follows:

"As far as the eighteenth is concerned, I shall charge you that in so far as the defendant Bozza is concerned, if you find that he was merely an underling, serving at the beck and call of an employer and nothing more than that would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he

aided and abetted in the carrying on of this business; then he would be chargeable as a principal."

(10) The Trial Court erred in instructing the jury as follows:

> "I feel that I have covered the twentieth in the statement just made, that Bozza, if he were simply an underling and at the beck of call of Chirichillo and was nothing beyond that, would not be guilty of the second count. But if you find that other facts existed, and that he effectively had the responsible control and possession of the still or that he aided and abetted, you would be justified in returning a verdict of guilty, provided you are satisfied of that beyond a reasonable doubt."

(11) The Trial Court erred in instructing the jury as follows:

> "I shall charge you furthermore, that the mere presence of a small quantity of alcohol at the still, standing alone, and of itself, does not conform to a description of concealment such as would bring the act within the operation of the statute, but it is a factor which you may consider with other circumstances; and if that factor, with other circumstances, satisfies you beyond a reasonable doubt that these defendants or either of them did conceal these spirits, you would be justified in returning a verdict of guilty as to such defendant."

(12) The Trial Court erred in refusing to charge appellant's twentieth request, without modification, as follows:

> "(20) It is a defense to the charge in the Second Count, if it appears that Bozza had no real control of the still but was merely there at Chirichillo's beck

and call to do what he ordered him to do, and that he did not have any function or responsibility of controlling and possessing the still. If this is all you find the proof shows against Bozza, you must acquit him of the Second Count."

(13) The Trial Court erred in refusing to charge appellant's twenty-third request, without modification, as follows:

"(23) In considering the Fourth Count of the indictment, the mere fact that there is testimony that a very small quantity of alcohol was found at the still is not in itself sufficient proof of a concealment of distilled spirits with intent to defraud the United States of tax, as the term concealment is used in the statute upon which the Fourth Count of the indictment is based."

(14) The Trial Court erred in refusing to charge appellant's twenty-fifth request, without modifications, as follows:

"(25) Mere knowledge that others are committing an offense against the law and even silent approval thereof, or a failure to inform the authorities that others are about to commit an offense, or are committing it, are circumstances which are not sufficient in themselves to prove that a defendant is a party to a crime, or that he is an aider or abettor of said crime."

(15) The Trial Court erred in making the following one-sided comment and partisan argument:

"The witness Vettor has testified as to what she saw there and she has testified that she saw John Bozza there three days a week. On cross examination it was brought out that she identified or first learned

of Bozza's name when she saw the name attached to a picture which she identified as the 'John' who had been there at least three days a week, out of at least fifty-five pictures which were shown her. There is no evidence that just one picture was shown her, but she says that at least fifty-five were shown her and that out of those fifty-five she picked out this man who she says was there three days a week. On the stand here she indicated that Bozza was the man who was at that still three days a week and she identified him here in court. You are to ask yourselves whether that is a credible identification. There has been contradictory testimony and there have been contradictory assertions about the condition of this woman. My recollection of Chirichillo's testimony is that so long as he was there he limited her to a certain amount of drink a day and that she was not, while he was there, drunk. She herself says that when she could steal it she did get drunk. So that you have testimony that at least while Chirichillo was there—and he says he was there a great deal of the time with her—she was not drunk. The mere fact that she was living in agonizingly bad circumstances and under loathsome circumstances does not of itself stamp her testimony as perjury. It is a matter which you may consider and when her statements are denied by Chirichillo you may ask yourselves what motive she had for testifying as she did, and what motive Mr. Chirichillo had for denying it. You may ask yourselves whether you believe Chirichillo's statement that he was afraid of this John, but that he wishes he could get him now, he would hand him over to the government, although for two or three months when was guarding this alcohol he didn't, as a matter of fact, hand him over to the government and claim the protection he says now he can so safely rely on."

(16) The Trial Judge erred in making the following partisan prejudicial comments to the jury in the form of an animated argument:

"But it also says this: The government of the United States has its rights too. The government of the United States is not any mystic, remote thing; this country of ours is you and I and one hundred and thirty-four million other people trying to live in peace and amity and under law. That's all it is; and that government is entitled to protection too. Remember that while an unwarranted sacrifice of anybody for the might of the United States government is a threat to its continuance, remember, I say that unpunished crime is also a threat to the continuance of this government; and while you consider and jealously consider the rights of the defendants, never for one moment must the rights of the people of the United States be sacrificed. Don't sacrifice anybody's rights. Justice can be done in this case and in any other criminal case without the sacrifice of the rights of anybody. If you believe that the government has not borne its burden of proving the guilt of these defendants beyond a reasonable doubt, it is your bounden duty to return a verdict of not guilty or else you will be faithless to your trust. If you believe the government of the United States has proven the guilt of these defendants beyond a reasonable doubt and you don't return a verdict of guilty, then you have failed most miserably in the primary function which is yours as citizens of this country.

It is not an easy task at times to weigh the respective rights of parties to a controversy. There is a controversy here with the parties being on the one side the United States of America, and on the other side Nicholas Chirichillo and Zachary Bozza, known as John Bozza. It is not, as I say, easy at times to

arrive at a just and true verdict, but the solemn obligation is yours to meet the task that has been placed upon you and to meet it fairly and squarely, courageously and honestly.

Let me in conclusion call to your minds something that happened yesterday. You took an oath and you called upon the living God to witness, and you said that you would a true verdict render according to the evidence so help you God. Now words of mine can explain what you have got to do more aptly, more tersely or more sententiously than that.

Don't weigh a poor bedraggled female; you are not trying her. We are here only to see whether she is telling the truth or not. When you weigh these men, weigh them to see whether they are telling the truth or not. Get the truth. Let the all-pervading and almighty truth be arrived at, and when you are satisfied in your minds and hearts and consciences that you have determined the truth, return a verdict which measures up to and squares with that truth. And then no one may quarrel with your verdict, no matter what it may be."

(17) The Trial Court erred in delivering the following instruction to the jury:

"The Court: Ladies and gentlemen of the jury: An exception has been taken to my charge in that counsel says from my zealousness and hitting on the desk I may have conveyed to the jury the fact that I was arguing for the conviction of the defendants. I cannot imagine anything further from a rational interpretation of my actions and remarks, but in the event that by some wild stretch of the imagination that may be true, remember that what I think about this matter does not weigh with you a particle and I am giving you no intimation of how I feel."

(18) The Trial Court erred in delivering the following instruction to the jury:

> "The Court: Counsel for Chirichillo has taken exception to the court's method of delivering the charge, saying that it would convey to the jury an impression that the court was prosecuting the defendant. Ladies and gentlemen of the jury, I repeat that I cannot see how such a conclusion could be arrived at, but lest there be any doubt in your mind I want you to know that I have an intention of conveying nothing to you except my view of the law, accompanied by such recital of the facts as occur to me, without in any way intimating to you my belief."

(19) The Trial Court erred and violated appellant's rights under the Fifth Amendment of the Constitution of the United States by increasing his sentence and punishment on the first, second and third counts of the indictment, after sentence on said counts had theretofore been irrevocably imposed, and appellant had commenced service of said earlier sentence.

(20) The Trial Court's sentence on the first, second and third counts of the indictment were not valid and in accordance with the statute.

(21) The Trial Court erred throughout the trial in unnecessarily taking an active part in the prosecution of appellant, and by his questions, and prejudicial, harmful and improper remarks and comments, displayed a hostile attitude to the appellant and his counsel, and by taking away the examination of witnesses from respective counsel who were properly conducting said examination, and by unduly interfering with counsel's examinations of witnesses, and by asking improper and illegal questions, and by making erroneous, prejudicial, harmful and improper remarks in the presence and hearing of the jury, as to the testimony and the weight that ought to be accorded to it,

and by making an animated partisan and prejudicial argument in favor of the government and against appellant, thereby not according this appellant the presumption of innocence throughout the trial, by maintaining an impartial attitude, and depriving appellant of a fair trial to which he was entitled under the law.

(22) The Trial Court erred in submitting the case to the jury when there was insufficient evidence in law and in fact upon which the jury could predicate a finding of guilt.

(23) The conviction of the appellant is illegal because all of the evidence in the case was as consistent with innocence of said appellant, as with his guilt.

(24) The sentence on the first, second and third counts is illegal and void.

WHEREFORE, appellant, Zachary Bozza, prays that the judgment herein for the errors aforesaid in the record and proceedings herein may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he lost by reason of said judgment.

HAROLD SIMANDL,
Attorney for Defendant-Appellant.

Service acknowledged this 1st day of November, 1945.

EDGAR H. ROSSBACH,
By CHARLES A. STANZIALE.

Order Allowing Appellant on Bail Pending Appeal.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 9013.

UNITED STATES OF AMERICA,

vs.

ZACHARY BOZZA, also known as JOHN BOZZA,
Defendant-Appellant.

This application coming on to be heard before Honorable Gerald McLaughlin, a Judge of this Court, who was heretofore designated to hear and determine same for and in behalf of the Court, in the presence of Harold Simandl, Esq., Attorney for appellant, and Honorable Charles J. Tyne, Assistant United States Attorney for the District of New Jersey; and upon hearing the argument of the counsel for the respective parties and being of the opinion that the appeal involves a substantial question which should be determined by this Court.

It Is, on this 6th day of August, Nineteen Hundred and Forty-five, ORDERED that the appellant, Zachary Bozza, also known as John Bozza, be admitted to bail in the amount of Twenty-five Hundred ($2,500.) Dollars, pending his appeal to this Court;

And it is FURTHER ORDERED that Honorable William J. Bartholemew, United States Commissioner for the District of New Jersey is hereby designated and empowered to take

said bail and pass upon its form and sufficiency, and upon appellant's sufficient compliance, to discharge the defendant on said bail, pending his aforesaid appeal.

(Sgd.) GERALD McLAUGHLIN,
Circuit Judge,
For the Court.

(Received and Filed Aug. 8, 1945
WM. P. ROWLAND, Clerk.)

Opinion of the Court.

(Filed May 17, 1946).

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 9013 October Term, 1945.

UNITED STATES OF AMERICA,

vs.

ZACHARY BOZZA, also known as JOHN BOZZA,
Defendant-Appellant.

ON APPEAL FROM CRIMINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued March 7, 1946.

Before BIGGS, GOODRICH and O'CONNELL, *Circuit Judges.*

By O'CONNELL, *Circuit Judge.*

Bozza and one Nicholas Chirichillo were tried and convicted under an indictment containing five counts charging offenses against the revenues of the United States. From judgment and sentence of the District Court for the District of New Jersey, Bozza appeals.

In a midnight raid on a dilapidated farmhouse at Woodbridge, New Jersey, state police officials discovered

an illicit still, set up but not cooking. Though barren of normal house furnishings, the apparently deserted structure contained the usual paraphernalia essential to an illicit still enterprise. In addition to the distillation plant, the officials found bags of sugar, 600 gallons of fermenting sugar mash, and 2½ gallons of alcohol which were in the receiving tank.[1]

From the government's case, it is fairly apparent that Chirichillo was the dominant member of the group which carried on the illicit enterprise. He leased the house. He brought raw materials there. With the help of Bozza and one other he operated the still. And, finally, Chirichillo transported the finished product, alcohol, to Newark for disposition there.

Because appellant challenges the sufficiency of the proof to sustain conviction on any count, the charges against him and the evidence in support thereof will be summarized.

The first count charges Bozza, Chirichillo, Ellen Vettor, and Peter Milito with the unlawful carrying on of the business of a distiller and the making and distilling of 2½ proof gallons of spirits with intent to defraud the United States of the tax thereon.[2] The second count charges the same parties with unlawfully having in their possession and custody and under their control a still set up for the unlawful production of distilled spirits for beverage and commercial purposes, which they failed to register as required by law.[3] The third count charges them with unlawfully making and fermenting 600 gallons of mash intended for distillation and production of spirits in a building not

[1] This is a receptacle into which the alcohol drips in the process of distillation. Presence of rust and water gives rise to appellant's speculation that the 2½ gallons of alcohol thus found might easily have been the residue in the tank remaining after the operators thought they had emptied it.

[2] 26 I. R. C. Sec. 2833a; 26 U. S. C. A. Sec. 2833a.

[3] 26 I. R. C. Sec. 2810a; 26 U. S. C. A. Sec. 2810a.

duly authorized as a distillery.[4] The fourth count charges them with the unlawful concealment of 2½ gallons of distilled spirits with intent to defraud the United States of the tax thereon.[5] The fifth count charges Bozza and Chirichillo with the unlawful transportation of 35 gallons of distilled spirits with intent to defraud the United States of the tax thereon.[6]

To sustain conviction of Bozza on any of the five counts, reliance must be placed on the testimony of Ellen Vettor. She testified that Chirichillo was the moving party throughout the enterprise. She identified Bozza as a man called "Jack" who "helped out" Chirichillo in the making of the alcohol inside the farmhouse. She swore that Bozza "wasn't there every day in the week" and that "he would just come around between two and three times a week he would appear there; he was not there steady." In response to a question of the court, "When he did come there what did he do?" she replied. "He would help, he would take instructions from Nick and help him around." The only other evidence she gave against Bozza was in describing how Chirichillo transported the alcohol from the farmhouse to Newark. She testified that the cans of alcohol were in Chirichillo's car, in which she rode, and that "sometimes we would follow Jack Bozza's car." She testified further that so far as she knew there never was any alcohol carried in Bozza's automobile.

The question for our determination is whether Vettor's testimony, relating to Bozza, as summarized above, is sufficient to sustain conviction on any of the counts. Section 332 of the Criminal Code[7] makes every person "who directly commits any act constituting an offense defined in

[4] 26 I. R. C. Sec. 2834; 26 U. S. C. A. Sec. 2834.
[5] 26 I. R. C. Sec. 3321a; 26 U. S. C. A. Sec. 3321a.
[6] 26 I. R. C. Sec. 2803; 26 U. S. C. A. Sec. 2803.
[7] 18 U. S. C. A. Sec. 550.

any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission" a "principal". Vettor's testimony justified a jury finding that Chirichillo directly committed and Bozza aided, abetted or counseled the commission of the offenses charged in the first three counts: *cf. United States* v. *Johnson*, 319 U. S. 503, 514 (1943).

But, the concealment and transportation counts stand on a different footing. Mere evidence that Bozza "helped around" in the cooking of alcohol would not justify a finding that he directly concealed or that he aided or abetted in the concealment of the specific 2½ gallons of alcohol found in the still's receiving tank: *cf. Czarnecki* v. *United States*, 95 F. (2d) 32 (C. C. A. 3, 1938); *United States* v. *Sall*, 116 F. (2d) 745 (C. C. A. 3, 1940).

We reach a similar conclusion regarding the conviction on the transportation count. Mere evidence that Chirichillo in transporting the alcohol sometimes followed Bozza's automobile would not warrant a finding that Bozza transported or aided or abetted in the illegal transportation of 35 gallons of alcohol.

Consequently, the convictions on the fourth and fifth counts cannot stand.

Appellant challenges the legality of the sentence on the first three counts. On the morning of July 23, 1945, following the return of the guilty verdict, the trial judge sentenced Bozza to two years' imprisonment on each of the first three counts and to two years' and six months' imprisonment on the fourth and fifth counts, all the sentences to run concurrently. That same day, about five hours later, Bozza was recalled and the court added certain minimum mandatory fines and penalties to the sentences.[8] In the

[8] Thus, conviction on the first count carried a mandatory punishment of a fine of not less than $100 nor more than $5,000 *and* imprisonment for not less than thirty days nor more than two years. Punishment for

interim, Bozza had been taken to a marshal's detention room in the same building in which the United States District Court is held and from there removed to the Hudson County Jail in Jersey City, a federal place of detention, where he awaited transportation to the place where his sentence was to be served. Appellant now contends that because he had begun service of his sentence (18 U. S. C. A. Sec. 709a) the trial judge lacked the power to increase his punishment by adding the fines and penalties. It is true that a judge is powerless to add to a sentence, once validly imposed, after the prisoner has begun to serve it. This is "upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb' ": *United States* v. *Benz*, 282 U. S. 304, 307 (1931). *Cf Roberts* v. *United States*, 320 U. S. 264 (1943).

However, it is well established that imposition of a sentence at variance with the statutory requirements is a "void act." Such a sentence may be superseded by a new sentence in conformity to the provisions of the statute. It is no hindrance that the correction—even when it entails a greater punishment—occurs after sentence has been partially served or after the term of court has expired: see *King* v. *United States*, 98 F. 2d 291 (App. D. C., 1938); *DeBenque* v. *United States*, 85 F. 2d 202 (App. D. C., 1936), cert. denied 298 U. S. 681 (1936); rehearing denied 299 U. S. 620 (1936); *Anderson* v. *Rives*, 85 F. 2d 673 (App.

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conviction on the second count is fixed by Act of Congress at a penalty of $500, fine of not less than $100 nor more than $1,000 *and* imprisonment for not less than one month nor more than two years. Under count 4, conviction required a fine of not less than $500 nor more than $5,000 *and* imprisonment for not less than six months nor more than two years. As to each count, on recalling the prisoner, the court added the minimum fine and penalty as required in order to bring the sentence into conformity with the Internal Revenue Code provisions cited in footnotes 2, 3, 4 *supra*.

D. C., 1936); *Egan* v. *United States*, 287 F. 958 (App. D. C., 1923); *Harman* v. *United States*, 50 F. 921 (C. C. D. Kan., 1892); 68 F. 472 (D. C. D. Kan., 1895) (same case on re sentence).[9] These authorities are dispositive of appellant's reliance on the double jeopardy clause of the Fifth Amendment unless they are distinguishable because, here, the trial judge corrected the erroneous sentence on his own initiative.

"Double jeopardy" is a plastic concept. Its application has never been immutably fixed, either at common law or under the protective Bill of Rights. *Palko* v. *Connecticut*, 302 U. S. 319, 322 (1937). Uncorrected, the court's action was violative of congressional will: *Ex parte* United States, 242 U. S. 27 (1916). Corrected, it merely imposed upon the defendant a penalty fixed by Act of Congress. This is neither double jeopardy nor double punishment. We see no constitutional hindrance to the court's action: *cf. United States* v. *Roberts*, 320 U. S. 264, 276, 277 (dissent by Frankfurter, *J.*) We conclude that the sentence as amended by the court below is valid and operative: *cf. Rowley* v. *Welch*, 114 F. 2d 499 (App. D. C. 1940).

Appellant's final contention that the charge of the trial judge "took the form of animated argument and amounts to acts of advocacy in favor of the government" is without merit. Taking the charge in its entirety, we believe it to be a fair presentation of the case and without prejudice to the appellant.

Since we have concluded that the government's proof was insufficient to sustain a conviction on either the fourth or fifth counts, a reversal must follow. The question is

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[9] In these cases, the defendant attacked the original improperly imposed sentence. A resentence even to a greater punishment than that originally imposed would not violate the double jeopardy clause of the Fifth Amendment: *Murphy* v. *Massachusetts*, 177 U. S. 155 (1900); *cf. Kepner* v. *United States*, 195 U. S. 100 (1904); *Trono* v. *United States*, 199 U. S. 521 (1905).

whether we must remand for a new trial or whether it is proper to direct entry of judgment of acquittal. A directed verdict of acquittal requires action by a jury and it has been held, under common law criminal practice, that upon an erroneous refusal of a trial judge to direct a verdict of acquittal, the appellate court must remand for a new trial. *Cf. Tatcher* v. *United States*, 107 F. 2d 316 (C. C. A. 3, 1939) with *United States* v. *Tatcher*, 131 F. 2d 1002 (C. C. A. 3, 1942). But see *Commonwealth* v. *Benz*, 318 Pa. 465, 472, and 477, (1935).

By the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, motions for directed verdict are abolished and in their place are substituted motions for judgment of acquittal. Rule 29(a).[10] And, Rule 29(b) permits judgments *non obstante veredicto*.[11] In the Advisory Committee Note to Rule 29(b) it is stated that, "This rule is in substance similar to Rule 50(b) of the Federal Rules of Civil Procedure and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts

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[10] Rule 29 (a) provides as follows: "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

[11] Rule 29 (b) provides as follows: "If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

have recognized and approved the use of a judgment *non obstante veredicto* for the defendant in a criminal case, *Ex parte* United States, 101 F. 2d 870, C. C. A. 7th, affirmed by an equally divided court, *United States* v. *Stone*, 308 U. S. 519, 60 S. Ct. 177, 84 L. Ed. 441. The rule sanctions this practice."

Rule 59 provides that the Rules "govern all criminal proceedings" commenced after their effective date, "and so far as just and practicable all proceedings then pending." The present is a "pending" proceeding. It is both just and practicable to reverse and remand for entry of judgment of acquittal on the fourth and fifth counts because of insufficiency of proof to sustain such convictions.

Accordingly, judgment of the court below is affirmed as to the conviction and sentence on the first three counts. It is reversed and remanded for entry of judgment of acquittal on the fourth and fifth counts.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

Order.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 9013 October Term, 1945.

UNITED STATES OF AMERICA,

vs.

ZACHARY BOZZA, also known as JOHN BOZZA,
Appellant.

Present: BIGGS, GOODRICH and O'CONNELL, *Circuit Judges.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed as to the conviction and sentence on the first three counts, but it is reversed and remanded for entry of judgment of acquittal on the fourth and fifth counts.

By the Court,

JOHN J. O'CONNELL,
Circuit Judge.

May 17, 1946.

Endorsements—

Order Affirming in Part and Reversing in Part,
Received and Filed May 17, 1946,
Wm. P. Rowland, Clerk.

Certificate.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,-Sct.
Third Judicial Circuit.

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, as constituting the portions of the record before this court at argument; and proceedings in this Court, in the case of *United States of America* vs. *Zachary Bozza*, Appellant, No. 9013, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 3d day of June in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the United States the one hundred and seventieth.

(Sgd.) WM. P. ROWLAND,
Clerk of the U. S. Circuit Court
of Appeals, Third Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 190

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 190

STIPULATION AS TO RECORD ON WRIT OF CERTIORARI—Filed October 30, 1946

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties that for the purpose of review by this Court on certiorari, the printed record may consist of the following:

1. Appendix to brief for appellant in the United States Circuit Court of Appeals for the Third Circuit.

2. The proceedings in the United States Circuit Court of Appeals for the Third Circuit.

3. The order of this Court granting certiorari.

4. This stipulation.

It is further stipulated and agreed that either of the parties hereto may refer in brief and argument to the complete, certified transcript of the record now on file in the office of the Clerk of this Court.

Dated: October 29th, 1946.

Harold Simandl, Attorney for Petitioner.

Dated: October 28, 1946.

George T. Washington, Acting Solicitor General.

[File endorsement omitted.]

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 15 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 190

ZACHARY BOZZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.

ZACHARY BOZZA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully represents:

I.

Summary Statement of the Matter Involved.

A. Petitioner, together with Nicholas Chirichillo, Ellen Vettor and Peter Milito were called to trial in the United States District Court for the District of New Jersey upon an indictment that contained five counts, in substance charging (R. p. 6, *et seq.*)

First Count.

That on or about the 19th day of January, 1945 at Woodbridge Township in the County of Middlesex, State and District of New Jersey, they did unlawfully engage in and carry on the business of a distiller, and did then and there distill a quantity of spirits subject to tax with intent wilfully to defraud the United States of such tax on spirits so distilled by them in violation of Title 26 I. R. C., Section 2833a;

Second Count.

That at the same time and place, they did wilfully have in their possession, custody and under their control, a certain set-up still which they failed and neglected to register with the District Supervisor of the Alcohol Tax Unit, contrary to the provisions of Title 26 I. R. C. Section 2810a;

Third Count.

That at the same time and place, they did wilfully and unlawfully make and ferment a quantity of mash fit for distillation in a said building, not then and there a distillery, in violation of Title 26, I. R. C. Section 2834a;

Fourth Count.

That at the same time and place, they did wilfully, knowingly and feloniously, and were concerning in the concealment of about 2½ gallons of distilled spirits for and in respect whereof a tax had been imposed and which said tax had not been paid, with intent to defraud the United States of such tax in violation of Title 26 I. R. C., Section 3321a;

Fifth Count.

That on or about January 7, 1945 in the Township of Woodbridge, Nicholas Chirichillo and Zachary Bozza, did wilfully, knowingly and unlawfully transport and were concerned in the transportation of 35 gallons of distilled spirits for and in respect whereof a tax had been imposed by law, which said tax had not been paid nor did the containers thereof have affixed thereto, a stamp etc. with intent to defraud the United States of tax, in violation of Title 26 I. R. C., Section 2803.

The Trial Court had dismissed Count 6 of the Indictment (R. p. 2).

B. Upon motion of the government, the Trial Court ordered a serverance as to the defendant, Ellen Vettor (R. p. 1).

She testified for the government.

In March, 1944, she commenced serving as a housekeeper for Chirichillo at 213 Center Street, Elizabeth, New Jersey (R. p. 10). In October 1944, he told her he was going to manufacture alcohol (R. pp. 13, 33). He told her he intended renting the old farm-house located on Cleveland Avenue in Woodbridge Township, New Jersey, owned by a Mrs. Collacaro, for that purpose (R. p. 12). She was present when he arranged the letting with Mrs. Collacaro and paid her the rent (R. pp. 11, 32). She and Chirichillo took possession of the farm house in October. The only furnishings they placed in it was a studio couch which they took from Chirichillo's apartment in Elizabeth (R. pp. 11, 34). She remained at the farmhouse until she went to the

hospital in January, 1945 (R. p. 14). In November, after they took possession of the farmhouse, she saw Chirichillo, a man named Dominick and another party (who was not in Court), carry still parts into the farmhouse (R. pp. 13, 14, 15, 25). Chirichillo purchased a 1936 Ford Sedan and used it to bring the still parts to the farm (R. p. 24). Chirichillo erected the still (R. p. 15). It took him at least a month to construct it, and it was finished by the latter part of November (R. p. 25). Chirichillo then brought in the sugar, coal and other supplies for operating the still (R. pp. 14, 21). Chirichillo (and no one else) made the mash (R. pp. 16, 33). She saw him place the sugar, water and yeast in the mash tanks and vats located in the attic of the building (R. pp. 16, 33). At first, she said she saw no one else at the still (R. p. 14). Then she said Dominick and Chirichillo did the cooking during the day (R. p. 22). Chirichillo manufactured, Dominick and "Jack Bozza" helped out (R. p. 15). "Bozza wasn't there every day in the week. He would just come around between two and three times a week . . . He was not there steady. He would take instructions from Chirichillo and just help him around" (R. pp. 18, 22). The alcohol was placed in cans and carted away by Chirichillo and Pete Milito (R. p. 17). Chirichillo and others, (not Bozza) would load the cans in the automobiles (R. pp. 17, 18). She had no housework to do at the farm, and she denied she worked at the still (R. pp. 36, 40). She devoted most of her time to drinking the alcohol that was manufactured (R. pp. 41, 35, 34). She drank a quart of the alcohol almost daily. Chirichillo would prepare bottles containing alcohol and water for her. (R. p. 43) Two such bottles found in the kitchen by the inspectors contained 182.8 proof alcohol.

In January, 1945, after Chirichillo had left the farmhouse, she went to the second floor and opened a can and drank some of its contents. "It wasn't good" (R. p. 30). She began to turn purple, and when Chirichillo saw her upon his return, he took her to the Rahway General Hospital (R. p. 30, 31). She was in a coma upon her admission (R. p. 84). While she was at the hospital, she was questioned by an investigator (R. p. 31). She remained in the hospital about a week, and was removed to the Middlesex County Workhouse.

Shortly after midnight, January 17th, she accompanied a group of officers of the State Department of Alcoholic Beverage Control, and pointed out the farmhouse to them. (R. p. 14) They entered the house, found it barren of furniture or furnishings except a cot with a couple of old blankets on it. (Tr. pp. 8, 43) On the second floor they found a still of approximately 300 gallon capacity set up, but not in operation. In the attic they found 6 empty galvanized vats, and twelve 100 gallon hogsheads, 6 of them filled with fermenting sugar mash. (Tr. pp. 21, 22) In the cellar they found a boiler, but there was no fire in it. (Tr. p. 13)

In her statement to the investigators she had mentioned a man called "Jack." (R. p. 40) There was no proof that Bozza was ever known as "Jack." (R. p. 40) About 10 days prior to the trial, she was incarcerated in the Hudson County Jail. (R. pp. 37, 10) There, she was shown about 55 photographs by an Agent. (C. pp. 40, 42) Among them was the picture of the defendant, Bozza. (C. p. 40) From the time of her arrest in January, 1945 until the day she entered the Courtroom, she had never been

brought face to face with Bozza and asked to identify him. (R. p. 43) The defendant, Milito is a farmer who owns a neighboring farm. (Tr. p. 63) Each year he rented Mrs. Collacaro's ground. (Tr. pp. 63, 64) He denied he was acquainted with Bozza, and insisted that the first time he ever met Bozza was in the Courtroom. (R. p. 57) He never saw Bozza at the Collacaro farm. (R. p. 62) He categorically denied the charges. (R. p. 51) Chirichillo denied that he knew Bozza or had met him prior to the day they were called upon to plead to the indictment. (R. p. 88) He denied that he ever met Bozza at the Collacaro farm. (R. pp. 78, 88)

The Trial Court directed a verdict acquitting the defendant, Milito. (R. pp. 2, 92, 94) Petitioner and Chirichillo were found guilty on all counts.

On the morning of July 23, 1945, petitioner was sentenced on the first, second and third counts, to imprisonment for a period of 2 years on each; and on the fourth and fifth counts to imprisonment for a period of two years and six months on each, all of the sentences to run concurrently. (R. p. 115)

Thereafter, petitioner entered upon the service of his sentence (Stipulation, R. pp. 116, 117). Subsequently, on the same day, petitioner was brought before the Judge, who increased the punishment by imposing on Count 1 a fine of $100., on Count 2 a fine of $100. and a penalty of $500., and on Count 3 a fine of $500 (R. pp. 3, 116, 117).

II.

Jurisdictional Statement.

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which on May 17, 1946, filed its opinion wherein the conviction and sentence on the first three counts was affirmed, but the conviction and sentence on the fourth and fifth counts was reversed, and the cause remanded for entry of judgment of acquittal on those counts (R. pp. 137a, 145a).

The opinion of the Court below has not yet been reported.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37 (b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III.

Questions Presented.

The questions presented are:

(1) Whether a mere casual employee or laborer who works at an illicit still, but who has no ownership, title or interest in the still, its operation or its product, can be held to be engaged in carrying on the business of a distiller, with intent wilfully to defraud the United States of tax, and punished as a "principal."

(2) Whether a mere casual employee or laborer, who works at an illicit still, always in the presence of and with his employer, (the owner and proprietor of said still), can be held to have "aided and abetted" the "possession, custody and control" of the still and be punished as a "principal," for failing to register it with the District Supervisor.

(3) Whether the Trial Court was bound to direct a verdict of acquittal where the undisputed proof affirmatively established the innocence of the petitioner of the charge laid in the Third Count of the indictment.

(4) Whether the Trial Court, in imposing sentence, having made a technical error, of which petitioner did not complain, could increase petitioner's punishment after petitioner commenced to serve said sentence.

(5) Whether portions of the Trial Judge's charge delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government.

(6) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury, on the first, second and third Counts of the indictment.

IV.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals decided that Chirichillo directly committed the offense charged in the first count, and that petitioner aided, abetted or counselled him in committing it (R. p. 140a). Chirichillo was the pro-

prietor and employer of petitioner. There was no proof that petitioner had a financial interest in the still, its product or anything at the farmhouse. In fact, there was not a scintilla of evidence that he had the financial means of acquiring such an interest. There was no evidence that he was in any wise liable for the tax or that he had an inducement or purpose to defraud the government out of the tax on the product that was distilled. His sole interest was the daily wage that he might receive.

In *United States* v. *Simmons*, 96 U. S. 360, 364, this Court held:

> • • • "punishment is not inflicted merely or solely because of the intent to defraud. It is the act of engaging in the distillation of spirits, combined with that intent, which constitutes the offence."

The decision in the case at bar conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Anderson* v. *United States*, 30 F. (2d) 485 where that Court held:

> "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the proprietors whose duty it is to pay the license tax."

It is also in direct conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Partson* v. *United States*, 20 F. (2d) 127, where that Court held:

> "There was no evidence that the defendant had any financial interest in any of the real or personal

property in or on the Clausen farm, except his clothes, or in the business thereof, except his interest in his hourly wages.

The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the effense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making."

Discussing Title 26, I. R. C., Section 2833a, upon which the first count was based, the Circuit Court of Appeals for the Second Circuit in *Seiden* v. *United States*, 16 F. (2d), page 197 said:

> "This section was plainly directed only against the proprietor, and a workman cannot commit or abet it."

In *United States* v. *Logan*, (C. C. E. D. Tenn.), Fed. Cas. 15,624, 26 Fed. case, page 992 the Court held:

> * * * "but if the proof shall also show that the defendant was not the proprietor and had no interest in the distillery, and was only employed by some other person as a laborer, in carrying on the work of distilling, then in law he can not be said to be carrying on the business of a distiller."

c/f *United States* v. *Cooper,* (C. C., E. D. Tenn.) Fed. Cas. No. 14,863, 25 Fed. Cas., page 627.

That Congress did not intend to hold a person who merely worked in an illegal still to the same standard of culpability as its proprietor, is evidenced by the fact that Congress has prescribed a maximum of six months imprisonment for those convicted of working in an illegal distillery. Title 26 U. S. C. A., Sec. 2831.

2. The Circuit Court of Appeals decided that Chirichillo directly committed the offense charged in the second count, and that petitioner aided, abetted or counselled him in committing it. (R. p. 140a)

There was no proof that petitioner was ever alone with the still. The evidence established that on each occasion that petitioner was present at the still, Chirichillo, his employer, was also present directing him.

Chirichillo was therefore exclusively in possession, custody and control of the still. Petitioner's services as an employee did not convert Chirichillo's exclusive possession, custody and control, into a joint possession, custody and control of himself and Chirichillo, within the meaning of the law.

The decision in the case at bar is in direct conflict with the decision of the 2nd Circuit in *Seiden* v. *United States,*

16 Fed. (2nd) 197, and the decisions of the 8th Circuit in *Patrilo* v. *United States*, 7 Fed. (2nd) 804; *Mangiaracina* v. *United States*, 40 Fed. (2nd) 164; *Kelly* v. *United States*, 61 Fed. (2nd) 843. In the *Mangiaracina* case, the 8th Circuit, at page 167, approved the following:

> * * * "If one is a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee is not guilty."

(3) The Circuit Court of Appeals decided that petitioner aided, abetted or counselled Chirichillo in committing the offense charged in the third count, (R. p. 140a) although the evidence affirmatively established that Chirichillo *alone* made the mash (R. pp. 16, 33). This Court has held that mere speculation must not be allowed to do duty for probative facts. *Galloway* v. *United States*, 319 U. S. 379. By any measure, it was the plain duty of the Trial Court to direct a verdict of acquittal as to this count.

(4) The Circuit Court of Appeals erroneously decided that the Trial Court's failure to impose fines as part of its sentence upon petitioner in the first instance, was a "void act", and that therefore, it had the power to increase petitioner's punishment after he had entered upon the service of said sentence (R. p. 141a).

The overwhelming weight of Federal jurisprudence is to the effect that a failure of a Court to impose a fine in addition to imprisonment is but a mere "technical error" of which the prisoner cannot complain because it is favorable to him. *Matchok* v. *United States* (C. C. A. 3) 60 F. (2d) 266; *Jordan* v. *United States* (C. C. A. 4), 60 Fed. (2d) 4, 6, Certiorari denied, 287 U. S. 633, 77 L. Ed. 545,

33 Sup. Ct. 84; *Bartholemew* v. *United States* (C. C. A. 6) 177 Fed. 902, 906, Certiorari denied, 217 U. S. 608, 54 L. Ed. 901, 30 Sup. Ct. 697; *Flynn* v. *United States*, (C. C. A. 7), 50 Fed. (2d) 1021, 1022; *Linningen* v. *Morgan*, (C. C. A. 8) 241, Fed. 645, 648; *Nancy* v. *United States* (C. C. A. 9) 16 F. (2d) 872.

The sentence as originally imposed was not a nullity, and after petitioner had begun to serve it, the Trial Court was powerless to add to it. *United States* v. *Benz*, 282 U. S. 304, 307 (1931); *Roberts* v. *United States*, 320 U. S. 264, (1943).

(5) The Circuit Court erroneously decided that the charge in its entirety was a fair presentation of the case and without prejudice to petitioner (R. p. 142). The record shows that the Judge's charge was climaxed by an animated argument (R. pp. 109, 111). When the Trial Judge delivered that portion of his charge that commences with the words "But it also says this"—(R. line 25 p. 106) his manner and tone changed. His remarks which followed were accompanied by gesticulations, repeated striking of the desk for emphasis, and shouting. The record is not silent as to this. Counsel's objection mentioned "the intonation of the voice and the striking of the desk and other things" (R. pp. 109, 111). The Judge did not challenge counsel's assertion, but frankly admitted his "zealousness and hitting on the desk" (R. p. 105). The Judge emphasized that the trial was between the United States of America—"the government of the United States"—"this country of ours"—on the one side, and petitioner on the other (R. pp. 106, 107). The Judge in effect told the jury that the government of the United States—"this country of ours"—which constituted the one side, were: (1) him-

self, the Judge—(2) the jury—(3) "and 134 million other people trying to live in peace and amity and *under law*" (R. p. 106). It will be noted that petitioner was not mentioned as he was not on *that side*, and the jury must have gained the impression that petitioner was not trying to live —"under law."

Striking his desk as he made the following comment, the Judge thundered—"that government is entitled to protection *too*." (R. p. 106 The Judge in effect said, "Remember" • • • "Remember, I say,"—"that unpunished crime is also a threat to the continuance of this government; and while you consider and zealously consider the rights of the defendants, never for one moment must the rights of the people of the United States be sacrificed." (R. p. 106) This was palpably—an appeal to the jury, that they should not let their government down; an appeal to their patriotism and citizenship.

The Court appealed to the jury's sympathy asking them not to weigh—"a poor bedraggled female", and pointing to the defendants (petitioner) said:—"when you weigh *these men*, weigh them to see whether they are telling the truth." (R. p. 107a) (Petitioner had not testified)

Dramatically, he called the jury's attention to the oath they had taken and—"you called upon the living God to witness."

This Court has held in *Reynolds* v. *United States*, 98 U. S. 145, 168 that:

> "Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; • • • it is the imperative duty of a reviewing court to take care that wrong is not done in this way."

In *Allison* v. *United States*, 160 U. S. 203, at page 217, the Court said:

> "Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided."

In *Quercia* v. *United States*, 289 U. S. 464, 470, this Court has held:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'"

This was a close case which rested upon the uncorroborated, unconvincing testimony of the accomplice, Ellen Vetto, an alcoholic. The portions of the charge complained of were practically the last words which the jury heard before they retired to deliberate. There can be little doubt that the Judge's animated argument did excite a prejudice which precluded a fair and dispassionate consideration of the evidence by the jury.

What the Trial Judge said and the manner in which he said it, after objection was taken, did not have the effect of removing the prejudice already imbedded. (R. p. 109) After the Trial Court's most definite and determined actions and assertions, it was hardly convincing for him to tell the jury—"I am giving you no intimation of how I feel." (R. p. 110)

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein; to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of the Circuit Court of Appeals may be reversed and that petitioner may have such other and further relief in the premises as this Court may deem appropriate.

ZACHARY BOZZA,
Petitioner.

HAROLD SIMANDL,
Attorney for Petitioner.

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Supreme Court
OF THE UNITED STATES

OCTOBER TERM, 1946

No. 190

ZACHARY BOZZA,

Petitioner,

—*vs.*—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

HAROLD SIMANDL,
Attorney for Petitioner.

In Petitioner's Brief—Zachary Bozza v. United States of America—No. 190

Addendum Page 12, Line 22

After citation Norris v. United States (C. C. A. 3), 34 F. (2d) 839: Certiorari granted, 281 U. S. 707, and judgment reversed, 281 U. S. 619, on other grounds. See Gebardi v. United States, 287 U. S. 112, 119.

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IN THE

Supreme Court

OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 190

ZACHARY BOZZA,

Petitioner,

—vs.—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 137-144) is reported in 155 F. (2d) 392.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 17, 1946 (R. 145). The petition for a writ of certiorari was filed June 15, 1946, and was granted October 14, 1946 (R. 147). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925; and Rule 37 (b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

Questions Presented.

(1) Whether a mere casual employee or laborer who works at an illicit still, but who has no ownership, title or interest in the still, its operation or its product, can be held to be engaged in carrying on the business of a distiller with intent wilfully to defraud the United States of tax and punished as a "principal."

(2) Whether a mere casual employee or laborer who works at an illicit still, always in the presence of and with his employer (the owner and proprietor of said still), can be held to have aided and abetted the "possession, custody and control" of the still, and the failure to register it with the District Supervisor and be punished therefore, as a "principal."

(3) Whether the Trial Court was bound to direct a verdict of acquittal where the undisputed proof affirmatively established the innocence of the petitioner of the charge laid in the Third Count of the indictment.

(4) Whether the Trial Court in imposing sentence, having made a mere technical error of which petitioner did not complain, could increase petitioner's punishment after he commenced to serve said sentence.

(5) Whether portions of the Trial Judge's charge delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government.

(6) Whether there was sufficient competent testimony of petitioner's guilt to justify the submission of the case to the jury, on the first, second and third Counts of the indictment.

Statutes Involved.

The pertinent statutes are as follows:

I. R. C., Sec. 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

I. R. C., Sec. 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., Sec. 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized accord-

ing to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *.

Section 332 of the Criminal Code (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

Statement.

Count 1 of a six-count indictment filed in the District Court for the District of New Jersey charged that petitioner, Nicholas Chirichillo, Ellen Vettor and Peter Milito, on or about January 19, 1943, at Woodbridge Township in the County of Middlesex, State and District of New Jersey, engaged in and carried on the business of a distiller and distilled a quantity of spirits, with intent to defraud the United States of the tax thereon, in violation of I. R. C., Section 2833 (a). (R. 5). Count 2 charged that the same defendants, at the same time and place, had in their possession, custody and under their control a still set up, which they failed and neglected to register with the District Supervisor of the Alcohol Tax Unit, in violation of I. R. C. Section 2810 (a) (R. 6). Count 3 charged that at the same time and place, they did wilfully and unlawfully make and ferment a quantity of mash fit for distillation in a building not a duly authorized distillery, in violation of I. R. C., Section 2834 (a) (R. 7).[1] Petitioner and Chirichillo were convicted after trial by a jury on all of the five counts (R. 2).[2]

---

1. It is unnecessary to summarize the allegations of the last three counts (R. 7-9). Count 6 (R. 9) did not concern petitioner, and the Trial Court dismissed it (R. 2). His conviction was reversed by the Circuit Court of Appeals on counts 4 and 5.

2. A severance was granted as to Ellen Vettor (R. 1) who became a witness for the government (R. 10). A verdict of acquittal was directed in favor of Milito (R. 2, 92, 94).

On the morning of July 23, 1945, petitioner was sentenced to concurrent terms of imprisonment for two years each, on Counts 1, 2 and 3 (R. 115). Thereafter, petitioner entered upon the service of his sentence (Stipulation R. 116). Later, on the same day, petitioner was brought before the Judge, who increased the punishment by imposing on Count 1 a fine of $100, on Count 2 a fine of $100. and a penalty of $500., and on Count 3, a fine of $500 (R. 3, 116, 117). On appeal, the convictions on Counts 1, 2, and 3 were affirmed, but the convictions on 4 and 5 were reversed for insufficiency of evidence to justify their submission to the jury, and the cause was remanded for entry of judgment of acquittal on those counts (R. 140, 142, 144, 145).

The evidence so far as it relates to Counts 1, 2, and 3 may be summarized as follows:

Ellen Vettor commenced serving as a housekeeper for Chirichillo in Elizabeth, New Jersey in March, 1944 (R. 10). In October, 1944, he told her he was going to manufacture alcohol (R. 13, 33). He told her he intended renting a farmhouse located on Cleveland Avenue in Woodbridge Township, New Jersey owned by Mrs. Collacaro for that purpose (R. 12). She was present when he arranged the letting with Mrs. Collacaro and paid her the rent (R. 11, 32). She and Chirichillo took possession of the farmhouse in October. The only furnishing they placed in it was a studio couch which they took from Chirichillo's apartment in Elizabeth (R. 11, 34). She remained at the farmhouse until she went to the hospital in January, 1945 (R. 14). In November, after they took possession of the farmhouse, she saw Chirichillo, a man named Dominick, and another party (who was not in Court), carry still parts into the farmhouse (R. 13, 14, 15, 25). Chirichillo purchased a 1936 Ford Sedan and used it to bring the still parts to the farm (R. 24). Chirichillo erected the still (R. 15). It took him at least a month to construct it, and it was finished by the latter part

of November (R. 25). Chirichillo then brought in the sugar, coal and other supplies for operating the still (R. 14, 21). Chirichillo (and no one else) made the mash (R. 16, 33). She saw him place the sugar, water and yeast in the mash tanks and vats located in the attic of the building (R. 16, 33). At first, she said she saw no one else at the still (R. 14). Then she said Dominick and Chirichillo did the cooking during the day (R. 22). Chirichillo manufactured, Dominick and "Jack Bozza" helped out (R. 15). "Bozza wasn't there every day in the week. He would just come around between two and three times a week * * *. He was not there steady. He would take instructions from Chirichillo and just help him around" (R. 18, 22). The alcohol was placed in cans and carted away by Chirichillo and Pete Milito (R. 17). Chirichillo and others, (not Bozza) would load the cans in the automobiles (R. 17, 18). She had no housework to do at the farm, and she denied she worked at the still (R. 36, 40). She devoted most of her time to drinking the alcohol that was manufactured (R. 41, 35, 34). She drank a quart of the alcohol almost daily. Chirichillo would prepare bottles containing alcohol and water for her (R. 43). Two such bottles found in the kitchen by the inspectors contained 182.8 proof alcohol.

In January, 1945, after Chirichillo had left the farmhouse, she went to the second floor and opened a can and drank some of its contents. "It wasn't good" (R. 30). She began to turn purple, and when Chirichillo saw her upon his return, he took her to the Rahway General Hospital (R. 30, 31). She was in a coma upon her admission (R. 84). While she was at the hospital she was questioned by an investigator (R. 31). She remained in the hospital about a week, and was removed to the Middlesex County Workhouse.

Shortly after midnight, January 17th, 1945, she accompanied a group of officers of the State Department of Alcoholic Beverage Control, and directed them to the farm-

house (R. 14). They entered and found it barren of furniture or furnishings except a cot with a couple of old blankets on it (Tr. 8, 43). On the second floor they found a still of approximately 300 gallon capacity set up, but not in operation. In the attic they found 6 empty galvanized vats, and twelve 100 gallon hogsheads, 6 of them filled with fermenting sugar mash (Tr. 21, 22). In the cellar they found a boiler, but there was no fire in it (Tr. 13).

In her statement to the investigators Ellen Vettor had mentioned a man called "Jack" (R. 40). There was no proof that petitioner was ever known as "Jack" (R. 40). About 10 days prior to the trial, she was arrested and confined in the Hudson County Jail (R. 37, 10). There, she was shown about 55 photographs by an Agent (C. 40, 42). Among them was the picture of petitioner (C. 40). From the time of her arrest in January, 1945 until the day she appeared at the trial, she had never been brought face to face with petitioner and asked to identify him (R. 43). Milito is a farmer who owns a neighboring farm (Tr. 63). Each year he rented Mrs. Collacaro's ground (Tr. 63, 64). He denied he was acquainted with petitioner, and insisted that the first time he ever met him was at the trial (R. 57). He never saw petitioner at the Collacaro farm (R. 62). He denied the charges (R. 51). Chirichillo denied that he knew petitioner or had ever met him prior to the day they were called upon to plead to the indictment (R. 88). He denied that he ever met petitioner at the Collacaro farm (R. 78, 88). Petitioner did not testify.

Summary of Argument.

I.

The Circuit Court of Appeals erroneously decided that Chirichillo directly committed the offenses charged in the first three counts, and that petitioner aided, abetted or counselled the commission of said offenses (R. 140).

As to Count 1. The offense charged in Count 1 consists of two material elements, i. e.—(1) the act of carrying on the business of a distiller (2) with intent to defraud the United States of the tax.

To hold one liable as an aider and abettor, there must exist a community of unlawful intention between him and the perpetrator of the crime. He must, in some way, associate himself with the venture, and participate in it as in something that he wishes to bring about and by his action make succeed. He must stand in the same relation to the crime as the criminal—approach it from the same direction, and touch it at the same point.

The proof disclosed petitioner to be merely a casual employee of Chirichillo, without ownership, title or interest in the still, its operation or its product. His service may have consisted of no more than to clean the furnace, remove ashes and similar menial chores. His sole interest was his daily wage.

Just as the purchaser is not considered the aider and abettor of the seller, so petitioner should not be regarded the aider and abettor of the offense in question.

As to Count 2. The evidence established that on each occasion that petitioner was present at the still, Chirichillo, his employer, was also present directing him. Petitioner was never alone with the still. Chirichillo was therefore, *exclusively*, in possession, custody and control of the still. Petitioner's presence, in the capacity of an employee, did not convert Chirichillo's *exclusive* possession, custody and control into a joint possession, custody and control of himself and Chirichillo within the meaning of the law. Nor did it aid or enhance Chirichillo's exclusive status. Petitioner was not obligated to register the still, and there was no proof that he had anything to do with Chirichillo's refusal or failure to register it, or that he could have controlled Chirichillo's actions in that regard.

As to Count 3. The proof *affirmatively* established that Chirichillo *alone* made the mash (R. 16, 33). While making mash may be a part of the process of manufacturing alcohol, it is perfectly plain that Chirichillo brought the supplies to the farmhouse, took them to the attic and placed them together with the water in the vats, *himself*. Petitioner was entitled to a directed verdict.

II.

The Circuit Court of Appeals erroneously decided that the Trial Court's failure to impose fines as part of its sentence upon petitioner in the first instance, was a "void act" and that therefore it had the power to increase petitioner's punishment after he had, without protest or complaint, entered upon the service of said sentence (R. 141).

Every imposition of sentence at variance with the statutory requirements is not a "void act." It is only so regarded, when the Court passes *beyond the limits* of the statute.

The overwhelming weight of Federal *jurisprudence* is to the effect that a failure of a Court to impose a fine in addition to imprisonment is but a mere "technical error" of which the prisoner can not complain because it is favorable to him. It is *within* the limits of the statute, *not beyond it*. Petitioner, without protest or complaint, began to serve the sentence as originally imposed. It was not void or a nullity, and the Trial Court, thereafter, was powerless to add to it.

III.

The record shows that practically the last words that the jury heard from the Trial Judge before they retired to deliberate were a dramatic and impassioned appeal to their patriotism, citizenship and sympathy (R. 106, commencing

line 25 *et seq.*) (Assignment of Error No. 16) (R. 131). His remarks were accompanied by gesticulations, striking of the desk for emphasis, shouting and inflections of voice (R. 109-111). They sounded more like comment of a zealous Prosecutor rather than instructions by an impartial Judge. What the Trial Judge said, and the manner in which he said it after counsel made objection, did not effectively remove the prejudice already created (R. 109).

The case against petitioner was woefully weak, but the Trial Judge's closing remarks and actions undoubtedly prejudiced the jury against him. The Circuit Court of Appeals did nothing to correct the wrong.

ARGUMENT

POINT I.

The trial court erred in refusing to direct a verdict of acquittal on counts 1, 2 and 3 of the indictment.

This issue is raised by assignments of error 1, 2, 8, 9, 10, 12, 22 and 23 (R. 118-134). It arises from motions addressed to each count of the indictment, both at the end of the government's case (R. 45) and at the end of the entire case (R. 92) for a directed verdict. Exceptions were noted to the rulings complained of (R. 45, 92).

The Circuit Court of Appeals held—"Vettor's testimony justified a jury finding that Chirichillo directly committed and Bozza aided, abetted or counselled the commission of the offenses charged in the first three counts." * * * (R. 140).

As to Count 1.

Chirichillo was the lessee of the farmhouse and possessor and proprietor of the still. While the still was in operation, petitioner came to the premises two or three times a week and received instructions from Chirichillo and would—"help

him around" (R. 18, 22). There was no proof that the operation of the still required more than the services of Dominick and Chirichillo (R. 22). Hence, it is reasonable to assume that petitioner's casual visits were for the sole purpose of cleaning the furnace, removing the ashes, garbage and the like.

There was no proof that he had a financial interest in the still, its product or anything at the farmhouse. In fact, there was not a scintilla of evidence that he had the financial means of acquiring such an interest. There was no proof that he was in any wise liable for the tax, or that he had an inducement or purpose to defraud the government out of the tax on the product that was distilled. His sole interest was the daily wage that he might receive.

In *United States* v. *Simmons*, 96 U. S. 360, 364 this Court held:

> • • • "punishment is not inflicted merely or solely because of the intent to defraud. It is the act of engaging in the distillation of spirits, combined with that intent, which constitutes the offense."

In *United States* v. *Peoni* (C. C. A. 2), 100 F. (2d) 401, is contained a discussion of Title 18, U. S. C. A., Section 550, and the historical development of the formula—"aids, abets, counsels, commands, induces or procures." The Court said at page 402:

> "It will be observed that all these definitions • • • demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."

In *Norris* v. *United States* (C. C. A. 3), 34 F. (2d) 839, 842, the Court said:

> "'We are satisfied that the purchaser is not an abettor of the offense within the meaning of the statute. The 'abetting' intended by it is a positive act in aid of the commission of the offense—a force, physical or moral, joined with that of the perpetrator in producing it. * * * The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal —approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offense wholly on the other side. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it. * * *"

See also *Morei* v. *United States* (C. C. A. 6), 127 F. (2d) 827.

In *Partson* v. *United States* (C. C. A. 8), 20 F. (2d) 127, appellant Partson, together with one Clausen and Sinovitch were charged with engaging in and carrying on the business of a distiller and making and distilling one proof gallon of spirits subject to tax, with intent then and there to defraud the United States. The proof showed that Clausen owned and occupied the farm where the still was seized. The officers found Partson at the still working and he admitted that he was an employee. The Court said:

"There was no evidence that the defendant had any financial interest in any of the real or personal property in or on the Clausen farm, except his clothes, or in the business thereof, except his interest in his hourly wages. The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the offense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making."

In *Anderson* v. *United States*, (C. C. A. 5) 30 Fed. (2d) 185, 187, appellant was convicted of carrying on the business of a retail liquor dealer, without having paid the special tax. In reversing the conviction, the Court said:

* * * "One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the properietors whose duty it is to pay the licence tax." * * *.

In *United States* v. *Logan*, (C. C., E. D. Tenn.), Fed. Cas. 15, 624, 26 Fed. case, page 992 the Court held:

> * * * "but if the proof shall also show that the defendant was not the proprietor and had no interest in the distillery, and was only employed by some other person as a laborer, in carrying on the work of distilling, then in law he can not be said to be carrying on the business of a distiller."

Acc: *United States* v. *Cooper*, (C. C., E. D. Tenn.) Fed. Cas. No. 14, 863, 25 Fed. Cas., page 627.

In *Seidey* v. *United States*, (C. C. A. 2), 16 F. (2d) 197. the Court discussed I. R. C., Section 2833a and said:

> "This section was plainly directed only against the proprietor, and a workman cannot commit or abet it."

Notwithstanding that the proof, in its best light to the government, indicated that petitioner "was merely an underling serving at the beck and call of an employer", and that he applied as the law of the trial, the propositions of law hereinbefore set out, the Trial Judge submitted the issue to the jury (R. 102). Plainly, it was a court question. *Graceffo* v. *United States*, (C. C. A. 3) 46 F. (2d) 852.

As to Count 2.

The evidence clearly established that Chirichillo had *exclusive* possession of, dominion and control over the still.[3] When petitioner came to the premises two or three times a week, he would receive instructions from Chirichillo and "help *him* around" (R. 18, 22). In other words, Chirichillo

3. "The possession and control and the operation of a distillery is by the statute made a vital element of the offense, and the person in such possession and control is made the offender." *Grunwald* v. *United States* (C. C. A. 3), 94 F. (2d) 952.

was present when petitioner helped him. There was no proof that petitioner ever had *custody* of the still, or that he was *alone* on the premises for any period of time so as to permit such *custody*.

In *Seiden* v. *United States* (C. C. A. 2), 16 Fed. (2d) page 197, appellant was found tending a still which was in operation. He denied he owned it. The Court said:

> *"The jury might have found him only 'engaged in the work,' and that is scarcely the equivalent of being the proprietor of the still.* The distinction was pointed out, but the charge was not mended. Hence we think we must treat the case as though the jury had found the defendant only to have been engaged in the work, and by that we understand that he might have *been no more than a workman for the owner of the still.*"
>
> "Count 2 was for having possession, control, or custody of an unregistered still. Ordinarily, a servant has no possession of his master's chattels left in his keeping, and this was the basis of the common-law rule that he could be guilty of larceny, *U. S.* v. *Clew*, 25 Fed. Cas. 480 No. 14,819; *U. S.* v. *Strong*, 27 Fed. Cas. 1356, No. 16,411. But it has never been doubted that a servant to whose keeping chattels were consigned, had their custody, and we are disposed to think that the word was used in Revised Statutes, para. 3258 (Comp. St. para. 5994), with this distinction in mind. If the defendant was engaged in operating the still and was, as was conceded, *alone* upon the premises, it followed that it had been left in his *custody*, if only temporarily." (Italics ours.)

In *Mangiaracina* v. *United States* (C. C. A. 8), 40 Fed. (2d) 164, appellant was arrested at a still and it was claimed he admitted operating it. He denied making that admission

and testified that he was working for another hauling sugar and yeast to the premises. The Court found that his story that he was working for a mysterious employer was not believable. The Court indicated that where it appeared that one was a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee, is not guilty. The Court said:

> "This case is clearly distinguishable from the cases of Patrillo et al. v. United States (C. C. A.), 7 F. (2d) 804; Grantello v. United States (C. C. A.), 3 F. (2d) 117, and Partson v. United States (C. C. A.), 20 F. (2d) 127, relied upon by appellant. In all of those cases *possession of the contraband articles was actually shown to have been in another party.* But here the purport of the evidence was that the appellant was in custody and control of still and mash, and he sought to absolve himself by a flimsy story of employment by the mythical Daviso. There is no substantial evidence *that any person other than appellant had, or ever had, custody of the premises with which we are here concerned.*" (Italics ours.)

And at page 167, the Court approved the following charge of the Trial Court:

> "The charge of the court required the jury to find that the accused 'had in his possession and under his control a distilling apparatus'; that mere 'knowledge of the existence of a still of the fact of the operating of a still, of course, by itself, is not sufficient to convict'; that '*if one is a mere employee of another who exclusively has control and possession of a still, then that person who is a mere employee is not guilty.*'" (Italics ours.)

In *Patrilo* v. *United States* (C. C. A. 8), 7 Fed. (2d), page 804 certain officers seized a still in the home of Patrilo. The other two defendants, Genino and Catalano said they were working for Patrilo. The Court said:

> "* * * first count speaks of having, holding, and possessing property designed for the manufacturing of intoxicating liquor. This means more than physical presence and the laying on of hands. As the pleader aptly charged, it means unlawful custody and control. The evidence shows that the premises were occupied by Patrilo as his home, the still and mash were in the basement of his house at his will and wish. *So far as the evidence indicates, that condition existed regardless of anything done or said by the other two defendants. They were Patrilo's hired servants. Aside from that it does not appear they had anything else to do with it, and those services did not convert Patrilo's possession and control of themselves and Patrilo, within the meaning of the law.* Grantello v. United States (C. C. A.) 3 F. (2d) 117. No case was made against Genino and Catalano on that count. Their request for an instructed verdict should have been granted." (Italics ours.)

In *Kelley* v. *United States*, (C. C. A. 8), 61 F. (2d) 843, appellant was seen leaving a building in which the officers found an illicit still, which was running, but at the time they entered, unattended. Appellant told the officers that he was working there for an unidentified owner. Here there was evidence, even if appellant's story was true, that he was in "custody", at least temporarily, of his employer's still. The Court, at page 847, approved the following charge which the Trial Court had delivered:

> "Another proposition urged is that certain instructions requested should have been given, one particularly with relation to defendant Kelley being a mere

employee of some one else, and hence not legally guilty of possession of either of the stills referred to in the fifth count. The court in its instructions as to this said: 'The possession that is there denounced by the Statute means an actual possession by the Defendant with intent to violate the law. It would be an *excuse and a defense to that charge if it should appear that the person in possession had no real control of the still mentioned here. If he was merely there at somebody's beck and call to do some particular thing and did not have any function or responsibility of controlling and possession of the stills he would not be liable to the charge as it is made.*' We think the court covered the issues very fairly in its instructions." (Italics ours.)

Petitioner's mere presence in the capacity of an employee did not convert Chirichillo's *exclusive* possession, custody and control, into a joint possession, custody and control between himself and Chirichillo within the meaning of the law. Nor did it in anywise aid, assist or enhance Chirichillo's exclusive status. Petitioner was not obligated by law to register the still. There was no proof that he had aided, counselled, or procured Chirichillo's refusal or failure to register it, or that he could have compelled or induced Chirichillo to take a different course. The Judge charged the jury that if petitioner "were simply an underling and at the beck and call of Chirichillo, and was nothing beyond that (he) would not be guilty of the second count" (R. 102). Notwithstanding, it was a Court question, he submitted the issue to the jury.

As to Count 3.

The proof *affirmatively* established that Chirichillo (and no one else) made the mash (R. 16, 33). It was established that the hogsheads and vats wherein the mash was made and fermented were in the attic of the house (Tr. 21, 22). Ellen Vettor testified (R. 16, 33):

"Q. Now, did you ever see any materials in these tanks in the attic? A. I saw the sugar being dumped into them.

Q. By whom? A. Nicholas Chirichillo.

Q. And who else? A. No one." * * *

And on page 33:

"Q. Well, what did you see done? A. I saw the sugar being put in the vat and the water being put in the vat and the yeast.

Q. And did Nick Chirichillo put the water in the vats and the yeast in the vats? A. He did.

Q. And did he put the sugar in the vats? A. Yes."

There was absolutely no proof whatever that petitioner had in any wise aided or assisted Chirichillo in making the mash.

This Court has held that mere speculation must not be allowed to do duty for probative facts. *Galloway* v. *United States*, 319 U. S. 379.

It was the plain duty of the Trial Court to direct a verdict of acquittal as to this count.

POINT II.

The trial court, having made a mere technical error, in imposing sentence in the first instance, of which petitioner did not complain, was without power to add further punishment after petitioner commenced to serve said sentence.

This issue is presented by Assignments of Error 19, 20 and 24 (R. 133, 134). Petitioner objected to the imposition of the additional punishment (R. 116).

On the morning of July 23, 1945, petitioner was brought before the Court and sentenced to concurrent terms of imprisonment for two years each on Counts 1, 2 and 3 (R. 2, 3, 115). Thereafter, petitioner was removed to the Hudson

County Jail (a Federal Place of Detention) to await transportation to the penitentiary at which his sentence was to be served (See Stipulation, R. 116, 117). Petitioner had entered upon the service of his sentence.[4] Thereafter, he was removed from the Hudson County Jail and brought before the Court which then imposed fines and penalties on said counts (R. 3, 116, 117).

The Circuit Court of Appeals concluded—"that the sentence as amended by the Court below is valid and operative" * * * (R. 142).

The Circuit Court recognized * * * "that a Judge is powerless to add to a sentence once validly imposed after the prisoner has begun to serve it" (R. 141).[5] It fell into error in assuming that *every* " * * * imposition of a sentence at variance with the statutory requirements is a 'void act.'"

In Bonner, Petitioner, 151 U. S. 242, this Court held that an imposition of sentence *beyond* the *limits* of the statute is a "void act" that may be superceded by a new sentence that conforms with the statute. But, where as here, the Court remains within the limit of the statute and fails to impose a fine in addition to imprisonment, it is not regarded as a "void act" but a mere "technical error" of which the prisoner can not complain, because it is favorable to him. *Matchok* v. *United States* (C. C. A. 3) 60 F. (2d) 266; *Jordan* v. *United States* (C. C. A. 4), 60 Fed. (2d) 4, 6, Certiorari denied, 287 U. S. 633, 77 L. Ed. 545, 33 Sup. Ct. 84; *Bartholemew* v. *United States* (C. C. A. 6) 177 Fed. 902, 906, Certiorari denied, 217 U. S. 608, 54 L. Ed. 901, 30 Sup.

4. Title 18 U. S. C. A., Section 709a provides: "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term. (June 29, 1932, c. 310, Sec. 1, 47 Stat. 381.)

5. *United States* v. *Benz*, 282 U. S. 304, 307; *Roberts* v. *United States*, 320 U. S. 264.

Ct. 697; *Flynn* v. *United States* (C. C. A. 7), 50 Fed. (2d) 1021, 1022; *Linningen* v. *Morgan* (C. C. A. 8), 241 Fed. 645, 648; *Nancy* v. *United States* (C. C. A. 9), 16 F. (2d) 872.

When the Court imposed the original sentence, petitioner did not complain, protest or apply to have it vacated, but commenced to serve it.[6] The sentence as originally imposed was not a nullity, and after petitioner had begun to serve it, the Trial Court was powerless to add to it. *United States* v. *Benz, Supra; Roberts* v. *United States Supra.*

POINT III.

The Trial Judge erroneously closed his charge with an animated argument that amounted to an act of advocacy in favor of the Government.

This issue is presented by assignments of error 16, 17 and 18 (R. 131, 132, 133). Appropriate exceptions were taken to the Trial Judge's remarks and conduct (R. 109, 110, 111). The Circuit Court of Appeals decided this point to be * * * "without merit"— * * * "the charge in its entirety * * * a fair presentation of the case and without prejudice to the appellant." (R. 142).

When the Trial Judge delivered that portion of his charge that commenced with the words—"But it also says *this*:" (R. 106, l. 25), his manner and tone of voice changed. His remarks thereafter were accompanied by gesticulations, repeated striking of the desk for emphasis, shouting, and inflection of voice. The record is *not silent* as to this. When counsel entered objection, he mentioned—"the intonation of the voice and the striking of the desk and other things" (R. 109, 111). Chirichillo's counsel concurred in the objection because " * * * it describes the attitude of the Court * * * he properly criticized its demeanor and the *slam bang*

6. Cases like *King* v. *United States*, 98 F. (2d) 291, App. D. C. cited by the Court below are, therefore, not applicable.

ing on the desk * * * it would lead the jury to believe that the Judge was practically instructing the jury to bring in a verdict of guilty" (R. 111). The Judge did not challenge counsels' assertions, but frankly admitted his— * * * "zealousness and hitting on the desk", * * * when he undertook * * * "to make a correction" (R. 109, 110).

The Judge opened this phase of his charge by loudly proclaiming—"the government of the United States has its *rights* TOO." He emphasized that the controversy was between the United States of America—"the government of the United States"—"this country of ours"—"the people of the United States"—on the one side, and petitioner and Chirichillo on the other (R. 106, 107). He told the jury that—"the government of the United States",—"this country of ours,"—is "you (the jury) and I (the Judge) and one hundred thirty-four million other people trying to live in peace and amity and under law" (R. 106). The jury must have received the impression that the Judge thought petitioner was not trying to live "under law".

Striking his desk as he made the following comment, the Judge thundered—"that government is entitled to protection TOO" (R. 106). The Judge in effect said,—"Remember" * * * "REMEMBER—I SAY",—"that unpunished crime is also a THREAT to the continuance of this government; and while you consider and zealously consider the rights of the defendants, never for *one moment* must the rights of the people of the United States be *sacrificed*" (R. 106). This was clearly an appeal to the jury that they should not let their government down—an appeal to their patrio-

tism and citizenship, of a character one might expect to hear during the summation of a zealous prosecutor.[7]

The Judge appealed to the jury's sympathy, when discussing the testimony of the accomplice, Ellen Vettor, the government's chief witness. He pleaded—"Don't weigh a poor bedraggled female; you are not trying her"s * * * and pointing to petitioner and Chirichillo said sternly—"when you weigh *these men,* weigh them to see whether they are telling the truth or not" (R. 107). Petitioner had not testified.

Dramatically, he called the jury's attention to the oath they had taken and—"you called upon the living God to witness."[9]

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7. In *Fitter* v. *United States* (C. C. A. 2), 258 F. 567 at page 571, it was charged that *prosecutor's* summation constituted an improper appeal to the prejudice and passion of the jury:

* * * "What is the country, gentlemen? Is the country that we live in—is it these buildings; is it the shores of California, with its wonderful, velvety grass; it it the mountains; * * * is that our country? Why, no. *You are what we call our country.* The men in the courtroom. The human beings that go to make this country what it is. That is your country. I tell you that when men violate this law at this time, and they come before twelve honest, intelligent jurors, and we give them the fair trial that they have had, we give them everything that they are entitled to. We say, this shall not continue, because it is the wrong, thieving crime that will hinder or delay the uplift of a great world and make it a better place to live in, and must be stamped out in its inception; * * *" (italics ours).

8. Earlier in his charge, he had argued; "the mere fact that she (Ellen Vettor) was living in agonizingly bad circumstances and under loathsome circumstances, does not in itself stamp her testimony as perjury" (R. 105). In *Yoder* v. *United States* (C. C. A. 10), 17 F. (2d) 85 at page 87, the Court said: " * * * the court then proceeded by argument to convince the jury that the testimony of defendant and his witnesses was not to be credited or believed; that the court did not believe the testimony 'of these two witnesses' (there were four); and that to believe such testimony was to ignore ordinary common sense and ordinary human nature The *court throughout its instructions referred to Mrs. Young as 'this little girl', and spoke of her as 'attractive and fascinating.'* * * * *As a further appeal to the sympathy of the jury the court said: 'She is a little girl who is fighting her battle alone in this matter'*" (Italics ours).

9. In *Oppenheim* v. *United States* (C. C. A. 2), 241 Fed. 625, 629, 630, the Court reversed because the charge was an argument on behalf of the government. In the closing portion thereof, the Trial Judge also referred to the *solemn oath* of the jury. Said the Court: "* * * The words of the judge's charge are the last words and the most weighty words that are dropped into the minds of the jury before they come to their verdict, and it is of the utmost importance that they should be *fair and impartial*" * * * (italics ours).

This Court held in *Reynolds* v. *United States*, 98 U. S. 145, 168 that:

> "Every appeal by the Court to the passions or the prejudices of a jury should be promptly rebuked; * * * it is the imperative duty of a reviewing court to take care that wrong is not done in this way."

In *Allison* v. *United States*, 160 U. S. 203, at page 217, this Court said:

> "Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided."

In *Quercia* v. *United States*, 289 U. S. 464, 470, this Court said:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'"

In *Bihn* v. *United States*, Vol. 90, Sup. Ct. Law. ed. Advance Opinions, pages 1208, 1211, 1212, this Court said:

> "* * *, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime. * * *"

"* * *, an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.' *It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging.* And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury, the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 327 U. S. —, ante, 318, 66 S. Ct. 402." (Italics ours.)

In *Bollenbach* v. *United States*, Vol. 90, Sup. Ct. Law. ed. Advance Opinions, pages 318, 321, this Court said:

"'In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' *Quercia* v. *United States*, 289 U. S. 466, 469, 77 L. ed. 1321, 1324, 53 S. Ct. 698. 'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr* v. *United States*, 153 U. S. 614, 626, 38 L. ed. 841, 845, 14 S. Ct. 919, and *Jurors are ever watchful of the words that*

fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. * * *"* (Italics ours).

In *United States* v. *Marzano*, (C. C. A. 2), 149 Fed. (2d) 923, at page 926, the Court said:

"* * * the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge."

In *Weare* v. *United States*, (C. C. A. 8), 1 Fed. (2d) 617, 619, the Court said:

"The jury can easily be misled by the court. Its members are sensitive to the opinion of the court, and it is not a fair jury trial when the court turns from legitimate instructions as to the law to argue * * * in favor of the prosecution. The government provides an officer to argue the case to the jury. That is not a part of the court's duty. He is not precluded, of course, from expressing his opinion of the facts, but he is precluded from giving a one-sided charge in the nature of an argument. We do not think the error in this case is cured by the mere statement to the jury that they were not bound by his opinion, and that they should follow their own judgment."

In *Minner* v. *United States*, (C. C. A. 10) 57 Fed. (2d) 506 at page 513, the Court said:

"His comments were in the nature of an argument to the jury rather than a fair and dispassionate statement of what the evidence showed and a tempered expression of his opinion as to the facts. In doing so, he assumed the role of an advocate rather than an impartial judge. That this was error is established by repeated decisions" * * *.

* * * "But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts."[10]

The government's case rested entirely upon the uncorroborated and unconvincing testimony of the accomplice, Ellen Vettor. She was in jail (R. 10, 37) and had hopes of getting out (R. 37) and apparently labored under the belief that she would *have* to testify favorably to the government in order to secure her freedom (R. 37, 38, 39). She was a confirmed alcoholic who consumed almost daily, a quart at least, of the raw 182.8 proof, alcohol (R. 43). A mind thus stupified and clouded could hardly offer a reliable identification. It is a matter of serious doubt as to whether she identified petitioner in the courtroom as the result of having seen him at the farmhouse, or because she recalled having

10. See also: *Hunter* v. *United States* (C. C. A. 5), 62 Fed. (2d) 217; *Adler* v. *United States* (C. C. A. 5), 182 Fed. 464; *Greene* v. *United States* (C. C. A. 5), 154 Fed. 401, 413; *Frantz* v. *United States* (C. C. A. 6), 62 Fed. (2d) 737, 739; *Cook* v. *United States* (C. C. A. 8), 14 Fed. (2d) 833, 834; *Stokes* v. *United States* (C. C. A. 8), 264 Fed. 18, 24; *Carney* v. *United States* (C. C. A. 9), 295 Fed. 606, 607; *DeGroot* v. *United States* (C. C. A. 9), 78 Fed. (2d) 244, 249, 250; *Williams* v. *United States* (C. C. A. 9), 53 F. (2d) 685; *Strader* v. *United States* (C. C. A. 10), 72 F. (2d) 589, 592; *Leslie* v. *United States* (C. C. A. 10), 43 Fed. (2d) 288, 289.

seen his face among the photographs that were shown her at the jail. The Trial Judge disregarded her testimony against Milito and acquitted him (R. 92). Chirichillo and Milito had denied that petitioner was at the farmhouse (R. 62, 78, 88).

It can be fairly said that the case against petitioner was extremely weak. The jury entered upon their deliberations with the Judge's closing animated argument ringing in their ears and fresh in their minds. Thus inflamed, there is little likelihood they accorded the evidence that fair, impartial, calm, and dispassionate consideration, to which petitioner was entitled.

What the Trial Judge said and the manner in which he said it after objection was taken, did not have the effect of removing the prejudice already imbedded (R. 109).

In *Rudd* v. *United States*, (C. C. A. 8), 173 Fed. page 912, at page 914, the Court said:

> "* * * A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain."

In *Parker* v. *United States*, (C. C. A. 6), 2 Fed. (2d) p. 710, 711, the Court said:

> "Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit. *Wallace* v. *U. S.* (C. C. A.), 291 F. 972, and cases cited. (The Wallace case was decided after the trial of this case.) An objection in this respect is not necessarily removed by the formal statement that the jury was under no obligation to adopt the judge's opinion; indeed, that statement may well be put in such a form as to imply disparagement of the jury's intelligence if it does not agree with the judge; the present charge does not lack that atmosphere."

In *Robinson* v. *United States*, (C. C. A. 8), 32 F. (2d) 505 at page 508, the Court said:

> "There are times when no admonition or instructions of the court can remove from the jury's mind the effect of improper conduct and remarks • • •."[11]

The Trial Judge invited counsel to the bench in order that they might state their objections to the charge, *out of the hearing of the jury.* The side-bar conference was in subdued tones, and was inaudible to the jury who were still seated in the courtroom (R. 109). After counsel stated his objection, the Judge unnecessarily disclosed to the jury what had taken place, and indicated resentment and hostility. The jury must have obtained the impression that counsel were guilty of gross impropriety for having even complained. If the Judge deemed counsels' complaint utterly devoid of merit, he should have merely overruled it without comment. After his most definite and determined actions and assertions, it did not help matters any for him to tell the jury —"I am giving you no intimation of how I feel."

11. See also *Wallace* v. *United States* (C. C. A. 6), 291 Fed. 972, 975; *Bolivar* v. *Kelly* (C. C. A 6.), 69 Fed. (2d) 58, 59.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed and the indictment dismissed for the reasons stated in Point I. At the least, petitioner is entitled to a new trial, because of the Trial Court's prejudicial animated argument to the jury.

Respectfully submitted,

HAROLD SIMANDL,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1946

No. 190

ZACHARY BOZZA,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF

HAROLD SIMANDL,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF

POINT I.

First Count.

At the trial, the government was content to try the case upon the theory that if petitioner was merely an underling serving at the beck and call of an employer and nothing more than that, he could not be held to be engaged in the business of a distiller (R. 102). However, in this Court and in the Court below, it has seen fit to question that theory of the case.

In *New York, &c R. Co.* v. *Estill,* 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, this Court held—that a theory of the case accepted by both parties at the trial, cannot be questioned for the first time on appeal.

The government has seen fit to argue as if a much broader question is before the Court. It seeks to establish that a non-proprietor may be convicted of a violation of the statute. Many decisions (involving other statutes), where the aider and abettor concept was applied under varying circumstances, have been cited. However, only a few decisions touching the problem actually before the Court, have been presented.[1]

The government's position has also forced it to contend that petitioner was a regular, not merely a casual employee; that he may have been a co-partner with Chirichillo in the illegal enterprise or he may have assisted Chirichillo on some other basis (Gov. Br. 14, 15);[2] or if he was a mere employee, his activity was not colorless[3] (Gov. Br. 16). The argument overlooks the fact that it was the government's burden to prove such matters, and that speculation cannot be allowed to do duty for probative facts.[4]

POINT II.

The government argues that the Trial Judge was vigorous in language but not partial (Gov. Br. 38). It points to the fact that in passing, he alluded to the rights of a defendant charged with crime, and instructed the jury to

---

(1) *Occinto* v. *United States*, 54 F. (2) 351 (C. C. A. 8) (Gov. Br. 20) is not in point. Counsel for Occinto, in a request for instructions, admitted that the jury could find from the evidence that Occinto was an agent, lessee or permittee.
In *Cvitkovic* v. *United States*, 41 F. (2) 682 (C. C. A. 9) (Gov. Br. 21), the credible testimony indicated that the defendants were partners.

(2) See Government's argument regarding Counts 2 and 3 (Gov. Br. 27-34).

(3) This statement is apparently based upon a question that was so leading that the Assistant United States Attorney virtually was the witness. "Q. When you say help him around the place you mean in connection with the operation of the still? A. Yes" (R. 18).

(4) *Galloway* v. *United States*, 319 U. S. 379.

acquit if they thought the government had not proved the defendants' guilt beyond a reasonable doubt (Gov. Br. 37). However, the record is clear that he was not as emphatic when he delivered the latter as he was in delivering the portion immediately following, that dealt with their duty if they believed the government had proven guilt[5] (R. 107). It is entirely probable that the jury attached significance only to the part thus vigorously emphasized.

The government points to the fact that the summations of counsel are not contained in the record, and recklessly speculates that they *may* have contained statements that provoked the Trial Judge's behavior (Gov. Br., pp. 13, 36).

The learned Assistant United States Attorney who appeared at the trial and argued the appeal in the Circuit Court, did not so contend. He knew differently. The government had an equal right and opportunity to bring the summations before the Circuit Court if it felt they were material.[6] Moreover, the Assistant United States Attorney summed up after defense counsel had completed their summations (R. 93). The government provided him to argue in behalf of the "interests of the people." That was not a part of the Judge's duty.[7]

We do not think we are unduly critical of Mrs. Vettor's "identification." It consists of her bare oral assertion. Although the still was seized in January, and the trial took place in July, the officers were not able to produce anything which corroborated her or inculpated petitioner. Her

(5) Counsel in objecting, complained that the Trial Judge had *emphasized*—"and you don't return a verdict of guilty, then you have *failed most miserably* in the primary function which is yours as citizens of this country" (R. 109).

(6) Rule 26, Par. 5 (e) of the Rules of the Circuit Court of Appeals for the Third Circuit, permits an appellee to print an appendix containing such parts of the record as have not been printed in the appendix of appellant.

(7) *Weare v. United States*, (C. C. A. 8), 1 F. (2) 617, 619.

"identification" of petitioner during the trial was aided and assisted by the fact that before hand, she had been re-arrested and shown petitioner's photograph. The fact that it was then among 55 others did not diminish its effectiveness as an aid.[8] The officers probably knew of Mrs. Vettor's loose morals and heavy drinking. Yet, they did not attempt to test her assertion by arranging for an "identification parade" before she testified (R. 43).[9]

We believe that counsel's objection clearly and sufficiently challenged the attention of the Judge to the error he committed in delivering that portion of the charge commencing with his description of the government of this country (R. 106-109).

The exception is entirely sufficient to bring the matter to the attention of this Court.[10]

Respectfully submitted,

HAROLD SIMANDL,
Counsel for Petitioner.

---

(8) See *Wigmore on Evidence*, Third Edition, Vol. 3, Section 786 (4).

(9) See *Wigmore on Evidence*, Third Edition, Vol. 3, Section 736 (a).

(10) *Corliss v. United States*, 7 F. (2) 455 (C. C. A. 8).

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No. 190

In the Supreme Court of the United States

OCTOBER TERM, 1946

ZACHARY BOZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 137–144) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 17, 1946 (R. 145). The petition for a writ of certiorari was filed June 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether one not disclosed by the evidence to have a proprietary interest in an illicit still, but who knowingly assists in the operation of the still, may be convicted as an aider and abettor, and hence as a principal under Section 332 of the Criminal Code, in the commission of the offenses of carrying on the business of a distiller with intent to defraud the United States of its taxes and of possessing an unregistered still, in violation of Sections 2833 (a) and 2810 (a), respectively, of the Internal Revenue Code.

2. Whether the addition of minimum mandatory fines to imprisonment sentences imposed earlier on the same day constitutes an invalid increase of the sentences by reason of the fact that service of the prison sentences had commenced before the addition of such fines.

3. Whether the trial judge's charge to the jury was unfair and prejudicial to petitioner.

STATUTES INVOLVED

The pertinent statutes are as follows:

> I. R. C., § 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not

less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

I. R. C., § 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., § 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be im-

prisoned not less than six months nor more than two years. * * *

Section 332 of the Criminal Code (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

Count 1 of a six-count indictment filed in the District Court for the District of New Jersey charged that petitioner, Nicholas Chirichillo, Ellen Vettor, and Peter Milito engaged in the business of distilling, and distilled a quantity of spirits with intent to defraud the United States of the tax thereon, in violation of I. R. C., § 2833 (a) (*supra*, pp. 2–3). Count 2 charged that the same defendants had in their possession and custody a still set up, which had not been registered as required by law, in violation of I. R. C., § 2810 (a) (*supra*, p. 3). Count 3 charged that they fermented about 600 gallons of a mash fit for distillation in a building not a duly authorized distillery, in violation of I. R. C., § 2834 (*supra*, pp. 3–4). (R. 5–9.)[1] Petitioner and Chirichillo were convicted after trial by a jury on all of the five

[1] It is unnecessary to summarize the allegations of the last three counts. Count 6 (R. 9) did not concern petitioner, and his conviction was reversed by the Circuit Court of Appeals on counts 4 and 5.

counts[2] naming petitioner (R. 113). Petitioner was sentenced to concurrent terms of imprisonment for two years on each of counts 1, 2, and 3, and to a fine of $100 on count 1, a fine of $100 and a penalty of $500 on count 2, and a fine of $500 on count 3 (R. 2–3, 115). On appeal by petitioner alone, the convictions on counts 1, 2, and 3 were affirmed, but the convictions on counts 4 and 5 were reversed for insufficiency of the evidence to justify their submission to the jury, and the cause was remanded for entry of judgment of acquittal on those counts (R. 140, 142–144, 145).

The evidence adduced by the Government, so far as it relates to counts 1, 2, and 3, may be summarized as follows:

Some time in October 1944, Chirichillo and Ellen Vettor moved into a dilapidated farmhouse in Woodbridge, New Jersey, which Chirichillo had rented from a Mrs. Colacarro. Over a period of several weeks, Chirichillo and two others brought still parts into the farmhouse and set up a still. With the assistance of petitioner and others, Chirichillo proceeded to manufacture alcohol. (R. 10–16.) Petitioner was at the farmhouse "between two and three times a week," at which times "he would help, he would take instructions

[2] A severance was granted as to Ellen Vettor (R. 1), who pleaded guilty (R. 3) and became a witness for the Government (R. 10). A verdict of acquittal was directed in favor of Milito (R. 92).

from Nick [Chirichillo] and help him around" in the operation of the still (R. 18). Three times a week, Chirichillo and Ellen transported the alcohol to Newark for disposition. On these occasions they sometimes followed Milito's truck and sometimes petitioner's car, but Ellen never heard petitioner say where the alcohol was to be taken "because the conversation was not in my language." (R. 19–21.) In a midnight raid on the farmhouse, state police officials discovered the still, set up but not in operation. In addition to the distillation plant, they found bags of sugar, 600 gallons of fermenting sugar mash, and 2½ gallons of alcohol. (R. 137–138.) Petitioner offered no evidence at the trial.

ARGUMENT

1. With respect to count 1, petitioner contends that as a "mere casual employee" of Chirichillo, without "ownership, title or interest in the still, its operation or its product," he cannot be held to have been "engaged in carrying on the business of a distiller, with intent wilfully to defraud the United States of tax, and punished as a 'principal' " (Pet. 7, 8–11). It is not necessary, however, that a person have any proprietary interest in a still in order to hold him liable as an aider and abettor, and therefore, by virtue of Section 332 of the Criminal Code, as a principal, in the carrying on of a distilling enterprise with intent

to defraud the United States of revenue; it is sufficient to prove that he knowingly assisted another in the carrying on of the business. *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615; *Vukich* v. *United States*, 28 F. 2d 666, 669 (C. C. A. 9), certiorari denied, 279 U. S. 847; *United States* v. *Pritchard*, 55 F. Supp. 201, 203 (W. D. S. C.), affirmed *sub nom. Waters* v. *United States*, 145 F. 2d 240 (C. C. A. 4). In *Vukich* v. *United States, supra*, Vukich was convicted of carrying on the business of a distiller without having given bond as required by law, in violation of Section 3281 of the Revised Statutes (now Section 2833 (a) of the Internal Revenue Code). The evidence showed that Vukich had supplied sugar to the operators of an illegal distillery. Error was assigned to the trial court's refusal to instruct the jury that, in order to convict, it was necessary for the Government to prove that Vukich "was either the proprietor or had some proprietary interest in the still or its operation" (p. 667). Error was also assigned to the court's instruction that "if there were others than the defendant engaged in operating that distillery, and the defendant knew they were so engaged in operating it and aided and assisted them in its operation with the intent and for the purpose of carrying their activities to success, then and under such circumstances he would be a principal, and would, within the meaning of this act

be engaged in carrying on the business of a distiller, by reason of the law which says that whoever does the acts necessary to constitute a crime, or who aids or abets another in their commission, is a principal" (p. 668). It was held that the requested instruction was properly refused and that the instruction given was proper.

In the present case, the court instructed the jury that if they found that petitioner "was merely an underling, serving at the beck and call of an employer and nothing more than that [that] would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal" (R. 102). The jury was also instructed that "Before a defendant can be held as an aider and abetter the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction" (R. 103). The evidence adduced against petitioner (*supra*, pp. 5–6) was plainly sufficient to warrant a finding that petitioner knowingly aided and abetted the carrying on of the illegal distilling business, and consequently was a principal by virtue of Section 332.

Taken as a whole, the trial judge's instructions, we believe, appropriately recognized that even the activities of an employee may be such, when coupled with the necessary intent and knowledge, as to make him *particeps criminis*. Thus, it has been held that an employee, without proprietary interest, may be held accountable as an aider and abettor, and therefore, under Section 332, as principal, in the carrying on, without payment of the required tax, of the business of a wholesale liquor dealer (*Wainer* v. *United States*, 82 F. 2d 305, 307 (C. C. A. 7), certiorari granted, limited to a question not here material, 298 U. S. 652, and affirmed, 299 U. S. 92) or of a retail liquor dealer (*United Cigar Whelan Stores Corp.* v. *United States*, 113 F. 2d 340, 346 (C. C. A. 9); *Mayer* v. *United States*, 259 Fed. 216, 217 (C. C. A. 6)). Of course, the fact that the business involved in the present case is that of distilling would not be a differentiating factor. There are, it is true, cases to the contrary, but for reasons to be noted we do not think they can be considered authoritative. In *Seiden* v. *United States*, 16 F. 2d 197 (C. C. A. 2), count 3 of an indictment charged that Seiden intended to "commence or continue the business of distilling without furnishing a bond." Seiden was found in a tenement where there was a still in operation. He was substantially unclothed and the circumstances strongly indicated that he was tending the still. The circuit

court of appeals, interpreting one of the instructions to the jury as permitting conviction on count 3 if Seiden was "no more than a workman for the owner of the still," reversed the conviction on that count. It simply stated that the statute on which it was based "was plainly directed only against the proprietor, and a workman cannot commit or abet it" (p. 199). Just why a workman, though chargeable with knowledge that the still was illicit (as the court said Seiden must be), could not "commit or abet" the offense charged, was not explained. In *Anderson* v. *United States*, 30 F. 2d 485 (C. C. A. 5), involving a prosecution for carrying on the business of a retail liquor dealer, without having paid the required tax, the court said (p. 487):

> One who is a mere employee may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice, and therefore regarded as a principal, in conducting a business, unless he is in fact one of the proprietors whose duty it is to pay the license tax.

No explanation for the distinction drawn was offered, and the only authority cited was *United States* v. *Logan*, 26 Fed. Cas. 990, No. 15,624 (C. C., E. D. Tenn.), which was a jury charge given in 1870, many years before the enactment of the general aider and abettor statute (Act of March 4, 1909, c. 321, § 332, 35 Stat. 1152). *Part-*

son v. *United States*, 20 F. 2d 127 (C. C. A. 8) involved a prosecution for the same offense as that on which count 1 of the present case was based. The evidence indicated that Partson was employed by the owner of the still to help operate it. The circuit court of appeals said (p. 129):

> The act of Congress under which he was indicted was a revenue act, the purpose of the section under which he was indicted was to prevent a distiller from defrauding the government out of the tax upon the product which he manufactured, and the defendant's intent to defraud was a condition precedent to his commission of the offense the section denounces. Partson had no interest in the property or the business. He was not and would not be liable for the tax, because neither the plant nor the product nor any part of it was or would be his property. There was no substantial evidence that he had any inducement to or purpose to defraud the government out of that tax. He was presumed to be innocent of any such intent and a studious review and consideration of all the evidence has forced our minds to the conclusion that all the substantial evidence in this case is not only as consistent with, but is more consistent with, innocence on his part than with his guilt of any intention to defraud the government out of the tax on the product Mr. Clausen was making.

While it seems to us that the court might well have held that there was sufficient evidence to establish that Partson knowingly aided in the operation of the still with intent to further Clausen's defrauding of the Government of its revenue, the case nevertheless turned upon an appraisal of the evidence as to intent.

Moreover, the *Seiden, Anderson* and *Partson* cases were decided prior to *United States* v. *Johnson,* 319 U. S. 503, 515, a case involving a prosecution for income tax evasion, in which this Court declared that all who consciously contribute to furthering an illicit enterprise and share in its execution are aiders and abettors in the commission of the offense and hence chargeable, under Section 332, as principals, notwithstanding the subordinate roles played by them in the execution of the scheme. Plainly, this standard of culpability is broad enough to embrace employees who knowingly assist their employer in the perpetration of an offense the gist of which is defrauding the Government of revenue.

In respect of count 2, petitioner contends that since the evidence did not show that he was alone at the still, it cannot be considered as having been within his possession, custody or control. However, under the authorities heretofore cited, to which should be added *Kelley* v. *United States,* 61 F. 2d 843, 848 (C. C. A. 8), there can be no doubt

that petitioner, by going regularly to the still premises and taking an active part in the operation of the still, aided and abetted Chirichillo in his unlawful possession and custody; hence, under Section 332, he was properly held accountable as a principal.[3]

With respect to count 3, petitioner contends that the Government failed to prove that petitioner fermented mash, or aided and abetted Chirichillo in so doing (Pet. 8, 12). The Government proved, however, that petitioner helped Chirichillo run the still and manufacture the whiskey, and since the fermentation of mash was one of the essential steps in the process of manufacturing the whiskey, the proof was sufficient to show that he aided and abetted in the making of the mash, and was therefore liable as a principal in the commission of that offense.

2. Petitioner contends that the imposition of fines under counts 1, 2 and 3 and a penalty of $500 under count 2 constituted an invalid increase of the prison sentences imposed on those counts, since he had already commenced service of those sentences (Pet. 8, 12–13). The facts on which this contention is based are as follows: On the morning of July 23, 1945, the trial judge im-

[3] In cases cited by petitioner (Pet. 11–12), a non-proprietor was either held to be chargeable, under the circumstances, with possession, custody or control of unregistered stills, or consideration was not given to the aider and abettor principle.

posed prison sentences on the counts in question (*supra*, p. 5). About five hours later, petitioner was recalled, and the court added certain minimum mandatory fines under counts 1, 2, and 3 and the mandatory penalty of $500 under count 2, such fines and the penalty being required by the respective statutes on which the counts were based (*supra*, p. 5). In the interim, petitioner had been taken to a marshal's detention room and from there removed to the Hudson County Jail in Jersey City, New Jersey, a federal place of detention, to await transportation to the place at which his prison sentences were to be served. (R. 116–117.)

It is true, as the circuit court of appeals observed (R. 141), that a judge is powerless to add to a sentence, once validly imposed, after the prisoner has begun to serve it. But it is well established that imposition of a sentence at variance with the statutory requirements is a void act. *In re Bonner*, 151 U. S. 242, 255–256; *In re Graham*, 138 U. S. 461, 462; *Ex Parte Karstendick*, 93 U. S. 396, 399. Such a sentence may consequently be superseded by a new sentence in conformity to the provisions of the statute, notwithstanding that the correction, even when it entails a greater punishment, occurs after the sentence has been partially served or after the term of court has expired. See the authorities cited by the circuit court of appeals (R. 141–142).

3. Petitioner finally contends that the trial judge's charge to the jury was "delivered in the form of an animated argument" and "went beyond permissible limits and amounted to acts of advocacy in favor of the government" (Pet. 8, 13–15). He complains principally of the judge's remarks concerning the rights of the people in a criminal trial (Pet. 14). But a reading of the entire portion of the charge (R. 106–108) of which petitioner complains, and from which he quotes excerpts out of context, is sufficient to show that the judge also stressed the rights of a defendant charged with crime and that he was as emphatic in his instructions to acquit if the jury thought the Government had not proved the defendants' guilt beyond a reasonable doubt as in his instructions to convict if they thought the defendants' guilt had been so proved. And when counsel for petitioner complained to the judge that from the intonation of his voice and striking of his desk the jury might have inferred that he was "arguing for a conviction," the judge was prompt to acquaint the jury with the nature of the exception, and specifically instructed them that he had no such intention and, in effect, that if they had gained such an impression, they should expunge it from their minds (R. 109–110). We submit, therefore, that there is no basis for a claim of reversible error.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring review by this Court. We therefore respectfully submit that it should be denied.

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 190

ZACHARY BOZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 137–144) [1] is reported at 155 F. 2d 592.

JURISDICTION

The judgment of the circuit court of appeals was entered May 17, 1946 (R. 145). The petition

[1] Pursuant to stipulation (R. 147), the printed record consists of petitioner's printed appendix to his brief in the court below and the proceedings in that court. References to the printed record are designated "R." The stipulation provides that either party may refer to the certified stenographic transcript of the record on appeal below. This transcript has been forwarded to this Court by the clerk of the court below. References to the transcript are designated "Tr." Certain exhibits referred to herein have also been transmitted to this Court.

for a writ of certiorari was filed June 15, 1946, and was granted October 14, 1946 (R. 147). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Where the evidence did not show that petitioner had a proprietary interest in an illicit still, that he was entrusted at any time with its possession, custody or control, or that he did anything specific, in contrast with the proprietor of the still, in connection with the preparation and fermenting of the mash or supplying or transporting its ingredients, but where the evidence did disclose that, at the direction of the proprietor, petitioner did assist him several times a week in the operation of the still and in the manufacturing of alcohol, whether petitioner was properly convicted as an aider and abettor, and hence as a principal under Section 332 of the Criminal Code, in the commission of the offenses of—

(a) carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled, in violation of I. R. C., § 2833 (a) (charged in the first count);

(b) possessing or having custody or control of an unregistered still, in violation of I. R. C., § 2810 (a) (charged in the second count); and

(c) making and fermenting mash fit for distillation in an unauthorized distillery, in violation of I. R. C., § 2834 (charged in the third count).

2. Whether the addition of minimum mandatory fines and a mandatory monetary penalty to imprisonment sentences imposed earlier on the same day constituted an invalid increase of those sentences when service of the prison sentences had commenced before the addition of the fines and penalty.

3. Whether the trial judge in his charge to the jury was unfair and prejudicial to petitioner.

STATUTES INVOLVED

The pertinent statutes are as follows:

> I. R. C. (26 U. S. C.) § 2833 (a): Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *
>
> I. R. C., § 2810 (a): Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the

collector of the district[2] in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; * * *.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years. * * *

I. R. C., § 2834: No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

Criminal Code, Section 332 (18 U. S. C. 550): Whoever directly commits any act constituting an offense defined in

[2] Registry is now made with the District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue. See *Fleisher* v. *United States*, 302 U. S. 218, 219.

any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

A six-count indictment filed in the District Court for the District of New Jersey alleged that Nicholas Chirichillo, Ellen Vettor, petitioner, and Peter Milito violated various provisions of the internal revenue laws relating to liquor (R. 5–9). The first three counts charged that the offenses were committed on or about January 19, 1945. Count 1 (R. 5) alleged that the defendants engaged in and carried on the business of a distiller, and distilled a certain quantity of spirits,[2] with intent to defraud the United States of the tax on the spirits so distilled, in violation of I. R. C., § 2833 (a) (*supra*, p. 3). Count 2 (R. 6–7) charged that the defendants had in their possession and custody and under their control a still set up, which they had failed to register as required by law, in violation of I. R. C., § 2810 (a) (*supra*, pp. 3–4). Count 3 (R. 7) charged that they made and fermented about 600 gallons of mash

[2] The allegation that the defendants distilled a specified quantity of spirits was undoubtedly inserted for the purpose of averring that the defendants had actually commenced the business of distilling rather than for the purpose of alleging that they were guilty of the additional crime made punishable by I. R. C., § 2806 (f). That section penalizes "any person engaged in carrying on the business of a distiller" who "defrauds or attempts to defraud the United States of the tax on the spirits distilled by him * * *."

fit for distillation in a building not an authorized distillery, in violation of I. R. C., § 2834 (*supra*, p. 4).[4] Petitioner and Chirichillo were convicted after trial by a jury on all three of the above counts as well as on counts 4 and 5 (R. 2, 113), the two latter counts not being involved herein (see footnote 4).[5] Petitioner was sentenced to concurrent terms of imprisonment for two years on each of counts 1, 2 and 3, and to a fine of $100 on count 1, a fine of $100 and a penalty of $500 on count 2, and a fine of $500 on count 3 (R. 2–3, 115, 116, 117). On appeal by petitioner alone to the Circuit Court of Appeals for the Third Circuit, his conviction on counts 1, 2 and 3 was affirmed, but his conviction on counts 4 and 5 was reversed because of the insufficiency of the Government's proof, and the cause was remanded for entry of a judgment of acquittal on those counts (R. 140, 142–144, 145).

The evidence adduced by the Government, so far as it relates to counts 1, 2 and 3, may be summarized as follows:

At about one o'clock a. m. on January 19, 1945 (Tr. 7, 27), on information received from Ellen

[4] It is unnecessary to summarize the allegations of the last three counts. Count 6 (R. 9) did not concern petitioner and was dismissed (Tr. 4; R. 2). Petitioner's conviction on counts 4 and 5 was reversed by the circuit court of appeals (R. 140, 142–144, 145).

[5] A severance was granted as to Ellen Vettor (R. 1), who became a witness for the Government (R. 10). She subsequently pleaded guilty (R. 3) and was sentenced to imprisonment for a year and a day (R. 4). A verdict of acquittal was directed in favor of Milito (R. 2, 92, 94).

Vettor that an illicit still was located at a farmhouse on Cleveland Avenue, Woodbridge Township, New Jersey, state authorities searched the house, which was pointed out to them by Mrs. Vettor. The house was a 2½ story frame structure, apparently deserted, and without shades or furniture except for an old stove, a cot, some old blankets and some dishes found in the kitchen. (Tr. 6–8, 43; R. 34.) The officers found a 300-gallon capacity still, with the usual still paraphernalia (pipes, fittings, gauges, etc.), set up but not then in operation (Tr. 11, 21). The various parts of the still described in the testimony were located on floors other than the attic floor. (Tr. 11–12, 21, 22, 23; Ex. G–8, Tr. 42; R. 16.) There were approximately 2½ gallons of alcohol in the receiving tank (Tr. 11–12, 22, 46). No fire was in the boiler (Tr. 13).

The mash vats were in the attic and consisted of twelve 100-gallon hogsheads, six of which were filled with fermenting sugar mash (Tr. 11, 12, 21, 33, 45; Ex. G–4, Tr. 42). Fermenting mash consists of sugar, water, yeast and a "booster"; the cycle of fermentation is three or four days. The mash found by the officers was not "dead" but "swirling." (Tr. 34.)

Six 100-pound bags of sugar and, in addition, sixteen 200-pound bags of sugar which were "broken up", were found, some in the kitchen and some on the second floor (Tr. 11, 22, 43).

Also found in the kitchen were two pint bottles of alcohol (Tr. 47).

The evidence discloses that Chirichillo signed a lease for the farmhouse in October 1944, under an assumed name (Tr. 56–58; Ex. G–1,* Tr. 62; R. 11). He then made a small deposit and returned in about a week to make a further deposit and receive the key of the house. He requested that the furniture be moved by November 1. (Tr. 58, 59; Ex. G–2, Tr. 61.) Ellen Vettor accompanied petitioner on one of these occasions (Tr. 60; R. 11, 32, 33).

Mrs. Vettor, who had resided with Chirichillo as his housekeeper at his home in Elizabeth, New Jersey, for a period of six months, moved with Chirichillo into the farmhouse some time in October, 1944. He had told her he intended to make alcohol. The only article of furniture they brought to the farmhouse was a studio couch. (R. 10–11, 13.) Mrs. Vettor remained at the farmhouse with Chirichillo a month and a half or two months until she was taken to the hospital by Chirichillo on January 11, 1945 (R. 14, 30–31, 33–34, 83–84).

It was upon the testimony of Mrs. Vettor that the Government depended to convict petitioner and, aside from other testimony in respect of the leasing of the premises by Chirichillo, to detail the

* While the lease is undated it is a fair inference from the testimony that it was executed some time in October, 1944.

activities of the several defendants and their relationship to the illicit enterprise.[7]

Mrs. Vettor testified that after she and Chirichillo moved into the premises, Chirichillo, "Dominick", and a man whose name she could not recall, brought still parts into the house (R. 13–14, 15, 24). Chirichillo worked on the construction of the still, which was completed within several weeks (R. 15, 25, 34). Chirichillo brought in the sugar and was the only one who dumped the sugar into the tanks in the attic (R. 15–16); he also put the water and yeast in the vats (R. 33). The "cooking" during the daytime was done by Chirichillo and Dominick (R. 22).[8] Chirichillo would pass the finished product—the cans of alcohol—out through the kitchen window to a helper who would place it in an automobile to be taken to Newark—sometimes in Chirichillo's sedan and sometimes in Milito's truck. Dominick would help at times to load the alcohol, but petitioner was never on the outside. The alcohol was taken

[7] There was evidence that Mrs. Vettor was a heavy drinker (R. 34, 35, 36, 41, 43, 84–85), but the jury was charged that they should keep that consideration in mind in appraising her testimony (R. 104, 105), that as an accomplice they should scrutinize her testimony with care (R. 96), and that in weighing her credibility they should ask themselves whether her testimony was influenced by expectation or hope of reward, or threat (R. 98).

[8] While Mrs. Vettor did not know who did the "cooking" at night, she testified that petitioner was not at the farmhouse at night (see *infra*, p. 10).

to Newark about three times a week until Mrs. Vettor went to the hospital in January. When she accompanied Chirichillo on the trips to Newark, the alcohol would be in the car, and they sometimes followed Milito's truck and sometimes petitioner's car. Alcohol was not carried in petitioner's automobile. (R. 17–18, 19–20, 21, 23, 27, 29, 35.)[9] On these trips, Chirichillo would bring back bags of coal with which to heat the "cooker" and also cans (R. 21, 36).

Petitioner, Mrs. Vettor testified, was known to her as "Jack" (R. 15, 20, 40, 44); he was not at the still premises steadily; he would come around two or three times a week; he would take instructions from Chirichillo and help him around with the operation of the still; he would help Chirichillo in manufacturing the alcohol (R. 14–15, 18). While the still was operated both day and night, petitioner was at the premises only during the daytime (R. 22).

Both Milito and Chirichillo, when they took the stand in their defense, testified that they never saw petitioner at the farmhouse (R. 62, 88); petitioner did not take the stand.

Motions for a directed verdict of acquittal were made on behalf of petitioner both at the close of the Government's case (R. 45) and at the conclusion of all the testimony (R. 92).

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[9] Petitioner's conviction on a transportation charge (count 5) was reversed by the circuit court of appeals (R. 140).

SUMMARY OF ARGUMENT

I

Petitioner was properly denied a directed verdict of acquittal on the first count but not, we think, on counts 2 and 3.

A. *Count 1.* While the evidence does not disclose that petitioner had any proprietary interest in the still, clearly, by assisting Chirichillo in the operation of an illicit still, he aided and abetted him in carrying on the business of a distiller with intent to defraud the Government of the tax on the spirits distilled. Petitioner was hence responsible as a principal under the federal aider and abettor statute.

While only one with a proprietary interest is subject to the tax and is therefore the primary offender, there is nothing in the criminal statute itself or in its underlying policy which excludes the application of the aider and abettor concept of responsibility.

Opposed to the few scattered decisions upon which petitioner relies is a line of cases which, correctly, we submit, have utilized the aider and abettor principle in connection with workmen and other non-proprietors both in respect of the instant criminal statute and analogous statutes designed to foster the revenue from liquor. These cases find support in the decision of this Court in *United States* v. *Johnson*, 319 U. S. 503, a prosecution for income tax evasion.

B. *Count 2.* According to the evidence, the unregistered still was in Chirichillo's possession, custody, and control. To be guilty as an aider and abettor, petitioner's activity was required to be of some assistance to Chirichillo in the latter's maintenance of his possession, custody, or control of the still, an offense of narrow impact. The evidence in this respect is too general. Petitioner's activity is described only as helping Chirichillo in the operation of the still. Evidence which does not rise above the level of suspicion, surmise, speculation, or conjecture does not meet the test that the conviction must be supported by substantial evidence.

C. *Count 3.* Likewise, there is nothing in the evidence which specifically indicates that petitioner in any way assisted Chirichillo in making or fermenting the mash.

II

The mandatory imposition of fines and penalty on the three counts here involved on the same day the sentences to imprisonment were imposed, but after service of the latter sentences had begun, did not constitute an invalid increase of punishment, in violation of the "double jeopardy" provision. Petitioner was only serving an allowable segment of an incomplete sentence; there was no increase in that portion of the sentence. All that the trial judge did when he imposed the fines and the penalty was, in essence, to complete the sentence which the law requires.

III

The charge of the trial judge, when the excerpts upon which petitioner relies are read in context, did not constitute "an animated argument" for conviction. It no more stressed the rights of the people in a criminal trial than those of a defendant charged with crime. Since the summations of defense counsel are not contained in the record, there is no way to estimate the need for a statement of the rights of the people. Additionally, upon objection by counsel for petitioner, the trial judge promptly instructed the jury that he had no intention of arguing for conviction, and he repeated this admonition several minutes later when counsel for Chirichillo repeated the objection.

ARGUMENT

I

A DIRECTED VERDICT OF ACQUITTAL WAS PROPERLY REFUSED ON COUNT 1 BUT NOT, WE THINK, ON COUNTS 2 AND 3

The Government's position is that petitioner should have been acquitted on counts 2 and 3 but not on count 1. The consequence would be that the fines and penalty assessed against petitioner under counts 2 and 3 would be set aside. The sentence of imprisonment for two years would stand, however, inasmuch as it was a concurrent sentence on all three counts and could have been imposed for the count 1 violation alone.

A. *Count 1.* Count 1 charged Chirichillo, petitioner and others with carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled (*supra*, p. 3).

It is not disputed that Chirichillo was proved to have committed this offense, and, hence, was properly convicted. Neither is it disputed that the Government proved that petitioner was at the farmhouse two or three times a week while the still was in operation,[10] at which times he helped Chirichillo operate the still and manufacture alcohol. And there can be no doubt under the evidence that petitioner assisted Chirichillo with knowledge that Chirichillo had no intention of paying the tax on the alcohol produced and with the intent to assist him in his criminal purpose. But petitioner contends that he was entitled to a directed verdict of acquittal because the Government's proof did not show that he had any financial interest in the still, its product, or anything at the farmhouse, or, indeed, that he had the financial means of acquiring such an interest and,

[10] There is nothing in Mrs. Vettor's testimony to indicate that petitioner's work at the still did not continue during the entire time the still was in operation. Hence there is no basis for petitioner's characterization of his activity as being that of a "mere casual" employee or laborer (Br. 2, 8, 11). Neither is there any basis for petitioner's assumption that his services consisted only of "cleaning the furnace, removing the ashes, garbage and the like" (Br. 11, 8). Mrs. Vettor testified that petitioner helped Chirichillo around in connection with the operation of the still (R. 18) and in manufacturing the alcohol (R. 14–15).

also, because there was no evidence that he was in any wise liable for the tax or that he had an inducement or purpose to defraud the Government out of the tax on the product that was distilled; "His sole interest," he says, "was the daily wage that he might receive" (Br. 11, 8).

There is nothing in the record to indicate that petitioner was working for Chirichillo at a daily wage. So far as the record discloses, he may have been a co-partner with Chirichillo in the illegal enterprise, or he may have assisted Chirichillo on some other basis. In any event, it was unnecessary for the Government to show that petitioner had any proprietary or financial interest in the still or its product or was subject to payment of the required tax. Even if he was merely a workman for Chirichillo, all that it was incumbent upon the Government to prove was that petitioner committed acts which furthered or assisted Chirichillo's criminal conduct, that at the time he committed such acts he knew that a crime was in process of commission, and that with such knowledge he acted with intent to aid and abet Chirichillo in his criminal activity. These are the elements which made petitioner responsible as a principal under the aider and abettor statute (*supra*, pp. 4–5) [11] and were the factors which the trial judge required the jury to find specifically before it could hold petitioner as an

[11] See *United States* v. *Johnson*, 319 U. S. 503, 515, 518.

aider and abettor (R. 102, 103), he having just previously instructed that there would be no basis for a finding that petitioner was himself engaged in the business of a distiller if he was merely an employee (R. 102), i. e., had no proprietary interest in the still. There can be no doubt that the evidence adduced against petitioner was sufficient to warrant a finding that, even if he was a mere employee, his activity was not colorless but of affirmative assistance to Chirichillo in carrying on his illicit distilling business, and that his aiding and abetting was done knowingly and wilfully, with the consequence, we submit, that he was equally guilty with Chirichillo as a principal by virtue of the aider and abettor statute.[12]

Petitioner rests his contention that a workman or one not having a proprietary interest in the business cannot properly be convicted, upon five cases which involved the instant or analogous statutes designed to insure the revenue from liquor: *United States* v. *Logan,* Fed. Cas. No. 15,624, 26 Fed. Cas. 990 (C. C. E. D. Tenn.); *United States* v. *Cooper,* Fed. Cas. No. 14,863, 25

[12] While the indictment did not specifically allege that petitioner was an aider and abettor, it is settled that an aider and abettor or an accessory before the fact may properly be charged directly with the commission of the crime itself. It is sufficient if the evidence discloses guilt on an aiding and abetting basis, provided, of course, that there are proper instructions presenting that concept of responsibility. *Jin Fuey Moy* v. *United States,* 254 U. S. 189, 192; *Melling* v. *United States,* 25 F. 2d 92, 93 (C. C. A. 7); *Collins* v. *United States,* 20 F. 2d 574, 578 (C. C. A. 8); *Harris* v. *United States,*

Fed. Cas. 627 (C. C. E. D. Tenn.);[13] *Seiden* v. *United States*, 16 F. 2d 197 (C. C. A. 2); *Partson* v. *United States*, 20 F. 2d 127 (C. C. A. 8) (one judge dissenting); and *Anderson* v. *United States*, 30 F. 2d 485, 487 (C. C. A. 5), citing the *Logan* case. The rationale of these decisions, most vigorously articulated in the two jury charges by the same judge in the *Logan* and *Cooper* cases, is that only the proprietor can be considered as carrying on the proscribed business because he alone is required to see that the tax is paid. This, and the apprehension, expressed in the *Cooper* case, that every workman in a large distillery might be subject to prosecution under the statute, resulted either in the express rejection of the aider and abettor principle,[14] or its ignoring, if relied upon by the prosecutor.

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273 Fed. 785, 790 (C. C. A. 2), certiorari denied, 257 U. S. 646; *United States* v. *Pritchard*, 55 F. Supp. 201, 203 (W. D. S. C.), affirmed *per curiam sub nom. Waters* v. *United States*, 145 F. 2d 240 (C. C. A. 4); cf. *Ruthenberg* v. *United States*, 245 U. S. 480, 483.

[13] The *Logan* and *Cooper* cases both involved jury charges delivered by the same judge. See *United States* v. *Harbison*, Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.).

[14] The jury charges in the *Logan* and *Cooper* cases were delivered before the enactment of the existing general aider and abettor provision in the Criminal Code (Act of March 4, 1909, c. 321, § 332, 35 Stat. 1152), but the common law aiding and abetting principle rejected in those cases was no different in substance or result from that embodied in the Code provision. See Clark and Marshall, *Law of Crimes* (4th ed., 1940), pp. 202, 203, 205; Bishop, *Criminal Law* (9th ed., 1923), pp. 474, 469–470; May, *Law of Crimes* (4th ed., 1938), pp. 81–82; see also *Rooney* v. *United States*, 203 Fed. 928.

Unless the primary statute indicates on its face that the aider and abettor principle does not apply, or unless there is some underlying policy consideration which dictates the exclusion of that principle,[15] it should be given full vitality in the

932 (C. C. A. 9). The absence of a federal common law of crimes did not exclude the utilization of recognized principles of common law criminal responsibility in the application of a federal criminal statute. *United States* v. *Gooding*, 12 Wheat. 460, 469, 471–472, 475–476; *United States* v. *Snyder*, 14 Fed. 554, 556 (C. C. D. Minn.); *United States* v. *Hartwell*, Fed. Cas. No. 15,318, 26 Fed. Cas. 196, 199–203 (C. C. D. Mass.), certified questions not here material answered, 6 Wall. 385; *United States* v. *Harbison*, Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.). The aider and abettor statute was designed only to eliminate procedural differences existing at common law as to accessories before the fact and principals in felony cases. See Clark and Marshall, *op. cit.*, pp. 202, 203, 205, 206–207; Bishop, *op. cit.*, pp. 474, 469–470, 482–483, 486; May, *op. cit.*, pp. 81–82, 85–86; 42 Cong. Rec. 1374; see also *Rooney* v. *United States*, 203 Fed. 928, 931–933 (C. C. A. 9); cf. *United States* v. *Dotterweich*, 320 U. S. 277, 281; *United States* v. *Gooding*, 12 Wheat. 460, 472, 475–476.

[15] Examples found in *Gebardi* v. *United States*, 287 U. S. 112, are: The purchaser of liquor is not regarded as an abettor of the illegal sale (p. 119); the consent of an unmarried person to adultery with a married person, where the latter alone is guilty of the substantive offense, would not render the former an abettor (p. 123). Instances where, analogously, the conspiracy principle may not be applied in connection with substantive offenses are recited in *Pinkerton* v. *United States*, No. 719, last Term, decided June 10, 1946, as follows (slip opinion, p. 2): "One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U. S. 354, 355–356; *Gebardi* v. *United*

application of a federal criminal law. The Congressional mandate is that not only the one who directly commits the criminal act but whoever aids or abets him in its commission shall be held equally responsible as a principal. There is certainly nothing in the definition of the offense in the criminal statute here involved which forbids the application of the aider and abettor concept of responsibility. That statute merely purports to define, in the usual manner, the crime of the primary offender. True it is that the only one who can fall within that category is the proprietor, since he is the only one who is subject to the tax and hence the only one who can carry on the business of a distiller with the intent to defraud the Government of its revenue. If he accomplishes this without the witting assistance of others, as, obviously, he well may, he alone is responsible. But where others aid him, knowingly and intentionally, be they workmen or any other non-proprietors, there is no reason why they should not bear equal responsibility with him for the fraud on the revenue.[16] While this concept

States, 287 U. S. 112, 121–122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime. *Gebardi* v. *United States*, *supra*."

[16] It has never been considered a barrier to the conviction of an aider and abettor that he cannot himself directly commit the substantive crime. *Barron* v. *United States*, 5 F. 2d 799, 801–802 (C. C. A. 1); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C. C. A. 7); *United States* v. *Snyder*, 14 Fed. 554, 556

applies to the large, ostensibly legal distillery, as well as the small, manifestly illicit distillery, such as is here involved, it holds criminally responsible only the culpable workman who knows that he is assisting an unlawful enterprise.[17]

Opposed to the few scattered decisions upon which petitioner is forced to rely is a line of cases which, in varying circumstances, have properly, we submit, utilized the aider and abettor concept in the application not only of the instant criminal statute but also of analogous statutes designed to foster the revenue from liquor and, hence, are at variance with the idea that only a proprietor may be convicted.[18] In *Occinto* v. *United States*, 54 F. 2d 351, 353 (C. C. A. 8), Laluna and Occinto were convicted of carrying on the business of a distiller with intent to escape

(C. C. D. Minn.); see also *Gebardi* v. *United States*, 287 U. S. 112, 120–121, fn. 5; Clark and Marshall, *Law of Crimes* (4th ed. 1940) pp. 226–228. Similarly, a person may be guilty of conspiracy although incapable of committing the substantive offense. *United States* v. *Rabinowich*, 238 U. S. 78, 86; *United States* v. *Holte*, 236 U. S. 140, 145; cf. *Gebardi* v. *United States*, *supra*, at 120.

[17] The extent of the muddied thinking which led the judge who delivered the *Logan* and *Cooper* charges (*supra*, pp. 16–17) to reject the application of the aider and abettor principle to workmen is illustrated by his statement in both cases that if he were to hold an employee criminally liable, it would follow that the employee would also be liable to pay the tax—a patent *non sequitur*.

[18] Some of these are later decisions of the same circuit courts of appeals which decided several of the cases upon which petitioner relies.

the tax on the spirits distilled. Laluna, the "main mover" in the illegal venture, had testified that Occinto "was helping me. Once in a while he come out there to help me." Referring to this as "abundant evidence of guilt," the court affirmed Occinto's conviction. See also *Hays* v. *United States*, 123 F. 2d 53 (C. C. A. 5) certiorari denied, 315 U. S. 801.

In *Cvitkovic* v. *United States*, 41 F. 2d 682, (C. C. A. 9), certiorari denied, 282 U. S. 871, one who claimed to be a mere employee of a distiller was convicted with others of carrying on the business without having given bond as required by law, an offense made punishable by the statute here involved. It was held that the trial court properly refused to instruct the jury that a person could not be convicted of aiding and abetting the commission of that offense (p. 684). See also *United States* v. *Dobbs*, Fed. Cas. No. 14,972, 25 Fed. Cas. 876, 878 (D. C. N. D. Miss.); *United States* v. *Davis*, Fed. Cas. No. 14,928, 25 Fed. Cas. 778, 779 (D. C. N. D. Miss.); *United States* v. *Carpenter*, Fed. Cas. No. 14,727, 25 Fed. Cas. 298, 299 (D. C. N. D. Ga.).

In *Wainer* v. *United States*, 82 F. 2d 305, 307 (C. C. A. 7), certiorari granted, limited to a question not here material, 298 U. S. 652, and affirmed, 299 U. S. 92, it was held that an employee, without proprietary interest, may be held accountable as an aider and abettor in the carrying on, with-

out payment of the required federal tax, of the business of a wholesale liquor dealer. "Obviously," said the court (p. 307):

> a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his efforts to its conduct and promotion, however slight his contribution may be.

The same conclusion has been reached in respect of employees of retail liquor dealers who carry on their business without the payment of the required federal tax. *United Cigar Whelan Stores Corp.* v. *United States,* 113 F. 2d 340, 346 (C. C. A. 9); *Mayer* v. *United States,* 259 Fed. 216, 217 (C. C. A. 6).

In *Wood* v. *United States,* 204 Fed. 55, 58 (C. C. A. 4), certiorari denied *sub nom. Rhea* v. *United States,* 229 U. S. 617, writ of error dismissed, 232 U. S. 731, an officer and an employee of a corporation which was carrying on the distilling business with intent to defraud the Government of its tax were held properly to have been convicted as aiders and abettors, as was one to whom the untaxed liquor was delivered and by whom it was sold.

It has been held that one who wittingly furnishes supplies to an illicit distiller to be manufactured into the contraband product is an aider and abettor in the carrying on of the unlawful

business. *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615; *Vukich* v. *United States*, 28 F. 2d 666, 668–669 (C. C. A. 9), certiorari denied, 279 U. S. 847. See also *United States* v. *Jackskion*, 102 F. 2d 683, 684 (C. C. A. 2), certiorari denied, 307 U. S. 635.[19]

One who assisted a distiller by hauling the raw materials to the still and the finished product away from it was likewise held to be an aider and abettor in the commission of the offense of carrying on the business of the distiller without giving bond. *Parente* v. *United States*, 82 F. 2d 722, 725 (C. C. A. 8).

And one who incites another to engage in the business of illicit distilling may be held accountable under the aider and abettor statute. *Burk* v. *United States*, 134 F. 2d 879, 881 (C. C. A. 5).

Additionally, it has been decided that one who made arrangements with an illicit distiller to purchase his product aided and abetted the carrying on of the distilling business without the necessary bond and with intent to defraud the Government of its tax. *United States* v. *Pritchard*, 55

[19] *United States* v. *Cusimano*, 123 F. 2d 611, 613 (C. C. A. 7), involving a supplier of sugar, finds no support for its apparently contrary holding in *United States* v. *Falcone*, 311 U. S. 205, upon which it relies. The *Falcone* case involved simply the problem whether, in a prosecution for conspiracy, there was evidence that the supplier knew that those to whom he sold were in the conspiracy.

F. Supp. 201 (W. D. S. C.), affirmed *per curiam sub nom. Waters* v. *United States,* 145 F. 2d 240 (C. C. A. 4). "In order to convict for the offense here involved," the court said (p. 203):

> it is not necessary that a defendant should carry on the business of a distiller personally, that he should be responsible for the labor, or interested as owner, or act as an agent in charge. It is enough that he aids and abets directly or indirectly the manufacture of the distilled spirits as a business, knowing that it is being carried on in violation of law. * * * Responsibility for crime is not limited under the federal statute to those who do the overt acts. It extends to all who knowingly and willfully take a hand in it, within the act defining a principal. * * *

In *United States* v. *Harbison,* Fed. Cas. No. 15,300, 26 Fed. Cas. 130 (C. C. E. D. Tenn.), the trial judge, in charging the jury, ruled that the owner of a distillery, who rents it to another, knowing that the latter intends to use it for distilling whiskey in violation of law, is guilty of aiding and abetting the unlawful manufacturer. In that case, in which the earlier *Logan* and *Cooper* cases (*supra,* pp. 16–17) in the same court were relied upon by the defendant, the judge exposed the "imaginary" nature of the hardship which would ensue if the aider and abettor concept were applied to workmen and other employees in a large distillery, when he said (pp. 130–131):

> * * * It is a necessary doctrine that all who knowingly aid are alike guilty. A thousand may be as much so as one, if they have common knowledge of illegality. The imaginary hardship of this doctrine is wholly answered when it is conceded that a laborer or other employe, without any knowledge that the law was violated, would be innocent. While the principle goes no further than to hold all guilty who, directly or indirectly, knowingly participate in the commission of the offence, neither justice nor policy would restrain its full application. * * *

See, also, *United States* v. *Howard,* Fed. Cas. No. 15,401, 26 Fed. Cas. 385 (D. C. W. D. Mo.).

Finally, although in a different setting, the concept that others than the person whose duty it is to pay a federal tax may be held accountable as aiders and abettors, and consequently as principals, in the offense of tax-defrauding, is settled, we think, by the decision of this Court in *United States* v. *Johnson,* 319 U. S. 503, 513–515, 518, an income tax evasion prosecution. There this Court said that all who consciously contribute to furthering such an illicit enterprise and who share in its execution are aiders and abettors in the commission of the offense and hence chargeable, under the aider and abettor statute, as principals, "whatever may have been the different roles of leadership and subordination among themselves." (p. 515). Plainly,

this standard of culpability is broad enough to embrace one who, like petitioner, knowingly and wilfully assists another to carry on the business of a distiller with intent to defraud the Government of the tax on the spirits distilled, even though his role may have been that of a hired laborer.[20]

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[20] In *Partson* v. *United States*, 20 F. 2d 127, 129 (C. C. A. 8), in which the evidence was treated as disclosing that Partson was a workman for one Clausen who was operating the still, it was held not only that Partson could not be considered as carrying on the proscribed business because he was not the proprietor and hence was not responsible for the tax, but that there was no substantial evidence that Partson had any inducement or purpose to defraud the Government out of the tax. Similarly, petitioner asserts that there was no proof that petitioner "had an inducement or purpose to defraud the government out of the tax on the product that was distilled" (Br. 11). It should be noted, however, that there is not a word in the *Partson* opinion indicating that any consideration was given to the aider and abettor principle of responsibility. The court was speaking of Partson purely in the sense of being a primary offender. Moreover, the aider and abettor concept could never be applied where the offense involves the carrying on of a particular business with intent to defraud the United States of its revenue unless it suffices to show that the aider and abettor knowingly and intentionally assists the proprietor in the carrying on of his fraudulent business, regardless of the aider and abettor's primary inducement, for, if petitioner's theory were applied, it is evident that the aider and abettor, not being liable for the tax, is not in a position personally to defraud, and, hence, will never have tax evasion as his principal motivation. *United States* v. *Johnson*, 319 U. S. 503, *supra*, sustaining the convictions of aiders and abettors of a tax defrauder, completely refutes petitioner's argument.

B. *Count 2.* Count 2 charged Chirichillo, petitioner, and others with having in their possession and custody and under their control a still set up which they had failed to register with the District Supervisor of the Alcohol Tax Unit by subscribing and filing with the Supervisor certain written statements (*supra,* pp. 3–4).[21] It is our opinion that the evidence was not sufficient to support this count and, therefore, petitioner's motion for a directed verdict of acquittal should have been granted as to it.

Although the Government had in Mrs. Vettor a witness who was peculiarly in a position to detail the relationship to the enterprise of the various persons she named, there is nothing in her testimony, or elsewhere in the evidence, to indicate that petitioner had any proprietary or financial interest in the still, or that he was ever entrusted, by whoever may have been its owner, with the possession or even with custody or control of the still for any interval of time.[22] In-

[21] The statements required by the statute to be filed with the Supervisor are "duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used" (*supra*, p. 4).

[22] There was no charge in the indictment that a conspiracy existed and no such concept of responsibility was submitted to the jury. Cf. *Pinkerton* v. *United States*, No. 719, last Term, decided June 10, 1946.

deed, the fair inference from her testimony is that the still was solely in Chirichillo's possession, custody and control until it was seized by the state officers. According to her testimony, Chirichillo told her he intended to make alcohol, leased the farmhouse in which the still was erected, worked on the construction of the still, brought in ingredients for the mash and fuel for heating the cooker, fed the ingredients into the mash vats, participated in the cooking of the mash, transported alcohol to Newark, and lived in the farmhouse until apparently about the time the still was seized by the authorities. All that we know about petitioner's activity we learn from Mrs. Vettor's testimony, and we think that when she testified that petitioner helped Chirichillo in the operation of the still and in manufacturing the alcohol, helped him around, taking directions from Chirichillo, her testimony is fairly understood as meaning that petitioner, under Chirichillo's direction, helped him while Chirichillo was present. In any event, there is nothing in her testimony to indicate that the still was left in petitioner's custody or control at any time. Under the authorities there was clearly no basis for the conviction of petitioner as the principal offender solely because he helped Chirichillo in the operation of the still. *Girgenti v. United States*, 81 F. 2d 741, 742 (C. C. A. 3); *Patrilo* v.

United States, 7 F. 2d 804, 805 (C. C. A. 8)[23] *De Gregorio* v. *United States*, 7 F. 2d 295, 296 (C. C. A. 2); cf. *Czarnecki* v. *United States*, 95 F. 2d 32, 35–36 (C. C. A. 3); *Kelley* v. *United States*, 61 F. 2d 843, 848 (C. C. A. 8); *Mangiaracina* v. *United States*, 40 F. 2d 164, 166 (C. C. A. 8); *United States* v. *Messina*, 36 F. 2d 699, 701 (C. C. A. 2); *United States* v. *Dibella*, 28 F. 2d 805, 806 (C. C. A. 2), certiorari denied, 278 U. S. 658; *Seiden* v. *United States*, 16 F. 2d 197, 198–199 (C. C. A. 2); see also *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C. C. A. 2); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2); *Grantello* v. *United States*, 3 F. 2d 117, 120 (C. C. A. 8).[24]

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[23] Certainly, to paraphrase the language of this case, petitioner's services in connection with the operation of the still "did not convert Chirichillo's possession and control into the joint possession, custody and control of petitioner and Chirichillo, within the meaning of the law."

[24] Obviously, the evidential situation in this case is markedly different from one where officers come upon an illicit still and those working or present at the still, despite the circumstances, make no explanation of their relationship to the still or indulge in incredible explanation. *Barton* v. *United States*, 267 Fed. 174, 175–176 (C. C. A. 4); *United States* v. *Mann*, 108 F. 2d 354, 356 (C. C. A. 7); *United States* v. *David*, 107 F. 2d 519, 522 (C. C. A. 7); *Crabb* v. *United States*, 99 F. 2d 325, 327 (C. C. A. 10); *Czarnecki* v. *United States*, 95 F. 2d 32, 35 (C. C. A. 3); *Kelley* v. *United States*, 61 F. 2d 843, 845 (C. C. A. 8); *Mangiaracina* v. *United States*, 40 F. 2d 164, 166 (C. C. A. 8); *United States* v. *Messina*, 36 F. 2d 699, 700, 701 (C. C. A. 2); *Otto* v. *United States*, 29 F. 2d 504,

The only question which remains on this count is whether petitioner's services in connection with operating the still and manufacturing the alcohol can be considered as aiding and abetting Chirichillo's possession, custody and control of the still, a theory submitted to the jury in the judge's charge (R. 102). The cases cited above which absolved employees do not discuss their responsibility under the aider and abettor doctrine, but that may have been because the particular circumstances were thought to leave no room for the application of that principle. We perceive no reason why, in appropriate circumstances, that doctrine of responsibility may not be applied to the offense in question. *Cardinal* v. *United States*, 50 F. 2d 166 (C. C. A. 8), gave it sanction by approving a charge which, if the evidence had justified it, would have permitted one who, upon learning that an unregistered still had been set up on land he had leased, took no steps to terminate the unlawful use, to be convicted as an aider and

505, 506 (C. C. A. 7); *Colasurdo* v. *United States*, 22 F. 2d 934, 936 (C. C. A. 9); cf. *United States* v. *De Vito*, 68 F. 2d 837, 839 (C. C. A. 2); see also *Duckwitz* v. *United States*, 15 F. 2d 195 (C. C. A. 9). Working at a still is not, of course, inconsistent with possession of the still, and the Government on motion for a directed verdict is entitled to all reasonable inferences and presumptions which arise from the evidence as a whole. In the instant case, the farmhouse was deserted when the officers seized the still and the Government depended on Mrs. Vettor's testimony as to what had previously transpired to sustain the issues in the case.

abettor.[25] And we think one who has been stationed as a guard or lookout to prevent molestation of the possession, custody or control of an unregistered still may properly be convicted as an aider and abettor of the offense. But petitioner's activities are described in the evidence only as helping around in the operation of the still and in the manufacture of alcohol. While, as we have argued, this evidence was sufficient to make him an aider and abettor of an offense of such broad compass as carrying on illegally the business of a distiller, embracing as it does all the varied activities which together comprise the running of a distillery, the section upon which the second count is based has a narrow impact. To afford complete regulation and hence complete insurance of the revenue, Congress descended in that section to a specific phase of illegal operation of the distilling business, just as it did in other sections, such as, for example, that penalizing the making or fermenting of mash in an unauthorized distillery. In respect of an offense of such a limited character as that charged in the second count, the activity, to be culpable as aiding and abetting, must surely have some immediate relation to the

[25] In *United States* v. *Dellaro*, 99 F. 2d 781, 783 (C. C. A. 2) Judge Learned Hand does not deny that there may be aiding and abetting of the offense. He thinks merely that the lessor's participation must be more affirmative in character, i. e., if "he chose to relet after he had had knowledge of the use to which the premises were being put."

specific object which the statute has in view. See *United States* v. *Carlin*, 92 F. 2d 425, 426 (C. C. A. 2). The evidence as to petitioner's activity was too general, we think, to show that what he did constituted any assistance to Chirichillo in the latter's maintenance of his possession, custody and control of the still. It is settled that there must be some substantial evidence fairly tending to support a conviction in order to sustain it. *Mortensen* v. *United States*, 322 U. S. 369, 374; *Glasser* v. *United States*, 315 U. S. 60, 80; *Abrams* v. *United States*, 250 U. S. 616, 619; *Stilson* v. *United States*, 250 U. S. 583, 588. Evidence which does not rise above the level of suspicion, speculation, conjecture, or surmise is insufficient. *Galloway* v. *United States*, 319 U. S. 372, 387; *Sutton* v. *United States*, 131 F. 2d 108, 109 (C. C. A. 5); *United States* v. *De Vito*, 68 F. 2d 837, 839 (C. C. A. 2); *United States* v. *Stappenback*, 61 F. 2d 955, 957 (C. C. A. 2); *United States* v. *Petrie*, 59 F. 2d 1005, 1006 (C. C. A. 2); *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8); *Lempie* v. *United States*, 39 F. 2d 19, 21 (C. C. A. 9).

Under long-settled and now elementary principles, petitioner's presence at the still, his knowledge of the existence of the still, his acquiescence in the situation, and his failure to bring the possessor to book, are not enough. This would, evidently, make him guilty of misprision of felony

(18 U. S. C. 251) but not of aiding or abetting the owner's possession. Clark and Marshall, *Law of Crimes* (4th ed., 1940), pp. 213–214.

C. *Count 3.* We think, for the same reasons that have been advanced as to the second count, that the evidence was insufficient as to the third count and, therefore, petitioner's motion for a directed verdict of acquittal should likewise have been granted as to that count. Count 3 charged Chirichillo, petitioner and others with making and fermenting a certain quantity of mash fit for distillation in an unauthorized distillery (*supra*, p. 4). Aside from the fact that there was no evidence that petitioner had any proprietary interest in the enterprise, Mrs. Vettor's testimony was that Chirichillo brought in ingredients for making the mash and was the only one who fed the ingredients into the mash tanks. The mash vats were in the attic of the house, whereas the still, evidently, was located in other portions of the premises. There is not a word in her testimony that petitioner supplied or brought in materials for making the mash or that he in any wise assisted in the making or fermenting of the mash; indeed, in respect of petitioner, the word "mash" is at no place mentioned in her testimony. There can be no doubt that the making and fermenting of the mash is a distinct process from the distillation process (see Encyclopedia Americana, vol. 9, "Distillation," "Distilled Liquors," and "Distill-

ing Industry").[26] Mrs. Vettor's testimony that petitioner helped in the operation of the still is, in our opinion, too general to support conviction of petitioner for assisting Chirichillo in the specialized activity to which the third count relates.

II

THE ADDITION OF THE MANDATORY FINES AND PENALTY TO THE PRISON SENTENCES WHICH PETITIONER HAD BEGUN TO SERVE DID NOT CONSTITUTE AN INVALID INCREASE OF PUNISHMENT

Each of the statutes on which counts 1, 2 and 3 were based (I. R. C., §§ 2833 (a), 2810 (a) and 2834, *supra*, pp. 3–4) makes mandatory the imposition of a fine *and* imprisonment. In addition, I. R. C., § 2810 (a), on which count 2 was based, requires the imposition of a $500 penalty. Due to an oversight, the trial judge, in sentencing petitioner on the morning of July 23, 1945, failed to impose the fines and penalty required. About

[26] The language of the mash section itself (I. R. C., § 2834) recognizes this distinction. Thus it provides:

> No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; * * *.

five hours later petitioner was recalled to the courtroom, and the judge added the minimum mandatory fines ($100 on each of counts 1 and 2, and $500 on count 3) and the mandatory penalty of $500 (on count 2).[27] In the interim, petitioner had been taken to the United States Marshal's detention room in Newark and from there removed to the Hudson County Jail in Jersey City, a federal place of detention, to await transportation to the place at which his prison sentences were to be served. (R. 113, 115, 116–117; see also R. 2–3.) Petitioner contends that the addition of the fines and penalty constituted an invalid increase of punishment because of the conceded fact (see 18 U. S. C. 709a) that he had meanwhile commenced service of his prison terms (Br. 19–21).[28] The contention, we submit, is without merit.

The statutes required the trial judge to impose not only imprisonment but also fines. The status of petitioner's first sentence was simply that it was incomplete. Petitioner had not

[27] No fines were imposed on counts 4 and 5 (see R. 2) as to which the court below reversed because of insufficiency of the evidence, since the statutes on which the counts were based, I. R. C. §§ 3321 (a) and 2803 (a) and (g), do not make the imposition of fines mandatory.

[28] Several weeks later petitioner was admitted to bail pending appeal (R. 135) and, so far as we can ascertain, has not recommenced service of his imprisonment sentences. Of course the addition of the fines on the second and third counts and the penalty on the second count need not be given consideration here if the Court should accept the view that the evidence was insufficient as to those counts.

started to serve a sentence which in its totality was a permissible sentence. While what was originally pronounced was permissible to the extent it went, no increase of this permissible portion occurred. It cannot matter, therefore, that petitioner had started service of this allowable segment. By filling up the gap so as to render the sentence which the law required, the trial judge was not increasing a sentence as to which the judicial power was exhausted because integrally it was all right and had passed into execution. All that he did by his two sentences was, in essence, to pass a single sentence which the law required. There is no basis for any contention that the "double jeopardy" provision was infringed.[29]

III

THE CHARGE TO THE JURY WAS NOT UNFAIR OR PREJUDICIAL

Finally, petitioner contends that portions of the trial judge's charge to the jury "delivered in the form of an animated argument went beyond permissible limits and amounted to acts of advocacy in favor of the government" (Br. 2, 21–29). With embellishments not disclosed by the record, he com-

[29] See *Braswell* v. *State*, 22 Ala. App. 119 (1927); *State* v. *Godwin*, 210 N. C. 447 (1936); *Commonwealth* v. *Hottle*, 139 Pa. Super. 128 (1940); *Nelson* v. *Foley*, 54 S. D. 382 (1929). See, also, Mr. Justice Rutledge's discussion of the salient principles in *Rowley* v. *Welch*, 114 F. 2d 499 (App. D. C.), to which may be added *In re Bradley*, 318 U. S. 50.

plains principally of the judge's remarks concerning the rights of the people in a criminal trial (Br. 21–22). But a reading of the entire portion of the charge (R. 106–107) from which petitioner quotes out of context the excerpts of which he complains, is sufficient to show that the judge equally stressed the rights of a defendant charged with crime and that he was as emphatic in his instructions to acquit if the jury thought the Government had not proved the defendants' guilt beyond a reasonable doubt as in his instructions to convict if they thought the defendants' guilt had been so proved. For example, he charged that "If you believe that the government has not borne its burden of proving the guilt of these defendants beyond a reasonable doubt, it is your bounden duty to return a verdict of not guilty or else you will be faithless to your trust" (R. 107). And when counsel for petitioner complained to the judge that from the intonation of his voice and striking of his desk the jury might have inferred that he was "arguing for a conviction," the judge was prompt to acquaint the jury with the nature of the exception, and specifically instructed them that he had no such intention and, in effect, that if they had gained such an impression, they should expunge it from their minds (R. 109–110), an instruction which, evidently, the trial judge was led to believe petitioner's counsel desired, since there is nothing to indicate that counsel at the time thought a mis-

trial was the only remedy. Additionally, the trial judge repeated his precautionary instruction only a few minutes later when counsel for Chirichillo echoed the objection made by petitioner's counsel (R. 111). Moreover, the summations of counsel are not contained in the record. It may be that the remarks of counsel for the defendants made advisable some statement by the trial judge that the interests of the people as well as those of the defendants should be given consideration. The trial judge was vigorous in language but not partial. We submit that there is no basis for a claim of reversible error.[30]

[30] The heavy drinking of Mrs. Vettor had been repeatedly emphasized by the defendants during the trial, with the result that the trial judge was required to devote considerable attention to that subject in his charge to the jury. See footnote 7, *supra*, p. 9. It was therefore not out of place, as petitioner contends (Br. 23), for the trial judge to instruct that the trial should not develop into a trial of "a poor bedraggled female", as contrasted with a trial of the defendants (R. 107). Moreover, objection to this portion of the charge was made only by counsel for Chirichillo. See R. 109–111.

While petitioner assails Mrs. Vettor's identification of him (Br. 27–28), the trial judge pointed out in his charge that Mrs. Vettor had testified that she saw petitioner, identifying him, at the still three times a week and that on cross-examination she picked his picture out of 55 which were shown to her, but he nevertheless left the question as to whether this was a credible identification to the jury (R. 105).

Also, when Mrs. Vettor's testimony is considered as a whole there is no real basis for petitioner's indication (Br. 27) that her testimony was involuntary. Cf. her cross-

CONCLUSION

For the reasons indicated, we respectfully submit that the judgment of the circuit court of appeals should be affirmed as to the first count and reversed as to the second and third counts.[31]

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DECEMBER 1946.

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examination at R. 39 with her later cross-examination at R. 40 and her redirect examination at R. 42. Moreover, the jury was specifically instructed that in weighing Mrs. Vetor's credibility they should take into consideration whether her testimony was influenced by expectation or hope of reward, or threat (R. 98).

[31] If the Court should be of the view that it has the power, it could, of course, remand the case as to the second and third counts to the district court for the entry of a judgment of acquittal on those counts, in accordance with the practice discussed and followed by the court below in respect of the fourth and fifth counts (R. 143–144). See also *Seiden* v. *United States*, 16 F. 2d 197, 199 (C. C. A. 2), where, under comparable circumstances, the circuit court of appeals modified a sentence by reducing the fines and affirming the judgment below as so modified.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1946.

Zachary Bozza, Petitioner, v. United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 17, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner and one Chirichillo were convicted in a Federal District Court on all counts of a five-count indictment against them which charged violation of the Internal Revenue laws in connection with the operation of a still. The Court of Appeals reversed petitioner's conviction on counts four and five because of insufficient evidence, but affirmed as to counts one, two, and three. 155 F. 2d 592. We granted certiorari. —U. S. —. Count one charged that the defendants had carried on "the business of a distiller . . . with intent willfully to defraud the . . . United States of the tax on . . . spirits so distilled . . ." in violation of 26 U. S. C. § 2833 (a). Count two charged them with having had possession and custody of the still in violation of 26 U. S. C. § 2810 (a). Count three charged that they had made and fermented mash for the production of alcohol in violation of 26 U. S. C. § 2834. It is argued that the evidence was insufficient to support any of the three counts here at issue. The Government concedes its insufficiency as to counts two and three.

There was testimony to show the following: Chirichillo rented a farmhouse under an assumed name and installed a 300-gallon still with all equipment necessary to ferment mash and distill alcohol. The still was operated day and night. Chirichillo himself mixed the ingredients to make the mash in the attic of the 2½-story frame building, but the alcohol distillation was carried on in another part of

the building. Petitioner was at the house two or three times a week. When there he took instructions from Chirichillo and helped him in the operation of the still; he helped manufacture the alcohol. When Chirichillo carried his products to Newark, the car in which he carried the illicitly distilled alcohol would follow along behind another car—sometimes petitioner's, sometimes another helper's. The farmhouse where the illicit business was carried on appeared from the outside to be deserted; the windows were without shades and the house had been practically stripped of furniture.

We accept the Government's concession that the evidence fails to show that this petitioner had made, or helped to make, the mash as charged in count three. All of the evidence showed that Chirichillo alone handled and mixed the ingredients of the mash, and there is nothing whatever to indicate that the petitioner ever took any part in, or aided and abetted, this particular part of the unlawful process in any manner, or, indeed, that he was ever in or around the attic where the mash was made from ingredients stored there. The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it.

The sufficiency of the evidence as to count two which charged that the petitioner had custody or possession of the still is a closer question. It might be possible that petitioner's helping to make the alcohol aided and abetted

in its "custody or possession." But that would be a very strained inference under any circumstances. Here again the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised, or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of "custody and possession" so nearly as it resembles the transportation of illegal liquor, 26 U. S. C. § 2803—an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession, such as, for illustration, service as a caretaker, watchman, lookout, or in some other similar capacity. Under these circumstances, we accept the Government's concession that a judgment of guilty should not have been rendered on the second count.

We think there was adequate evidence to support a finding of guilt on the first count which charged operation of the business of distilling to defraud the Government of taxes. There was certainly ample evidence to show that Chirichillo carried on the business of a distiller and that the petitioner helped him to do it. 18 U. S. C. § 550 provides that one who aids and abets another to commit a crime is guilty as a principal. Consequently, the jury had a right to find, as it did, that the petitioner and Chirichillo were equally guilty of operating the business of the distillery. See *United States* v. *Johnson*, 319 U. S. 503, 515, 518.

But, it is argued, there was no evidence that the petitioner acted with knowledge that the distillery business was carried on with an intent to defraud the Government of its taxes. The same evidence as to knowledge of this guilty purpose, however, that applied to Chirichillo was almost, if not quite, equally persuasive against both

defendants. Petitioner assisted in the manufacture of alcohol in Chirichillo's still which was operated under conditions of secretiveness in an apparently abandoned farmhouse. The finished alcohol was carried to Newark in a car which followed another car, sometimes the petitioner's. The members of the jury could properly draw on their own experience and observations that lawful stills, unlike the still in which petitioner worked, usually are not operated clandestinely and do not deliver their products in the fashion employed here. The members of the jury were not precluded from drawing inferences as to fraudulent purposes from these circumstances, nor were they compelled to believe that this petitioner was oblivious of the purposes of what went on around him. Men in the jury box, like men on the street, can conclude that a person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: "The Revenuers are coming!" We hold that the verdict of guilty on the first count must stand.

The only statute for violation of which petitioner's conviction is sustained by us carries a minimum mandatory sentence of fine of one hundred dollars *and* imprisonment, 26 U. S. C. § 2833 (a). In announcing sentence at a morning session, the trial judge mentioned imprisonment only. Thereafter the petitioner was taken briefly to the U. S. Marshal's office and then to a local federal detention jail awaiting transportation to the penitentiary where he was finally to be confined. But about five hours after the sentence was announced, the judge recalled the petitioner and according to stipulation, stated in the presence of petitioner and his counsel that "in the imposition of sentence this morning . . . it has been called to my attention that there are certain mandatory fines and penalties which I

omitted to impose. For the record now minimum mandatory fines and penalties will be imposed." Thus a one hundred dollar fine was fixed, as required by law, along with the imprisonment sentence. Petitioner charges that this action constituted double jeopardy forbidden by the Federal Constitution.

It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, *Reynolds* v. *United States*, 98 U. S. 145, 168–169; *Murphy* v. *Massachusetts*, 177 U. S. 155, 157, or in habeas corpus proceedings. *In re Bonner*, 151 U. S. 242. But in those cases it was recognized that an excessive sentence should be corrected, even though the prisoner had already served part of his term, not by absolute discharge of the prisoner, but by an appropriate amendment of the invalid sentence by the court of original jurisdiction, at least during the term of court in which the invalid sentence was imposed.[1] *Cf. De Benque* v. *United States*, 85 F. 2d 202. In the light of these cases, the fact that petitioner has been twice before the judge for sentencing and in a federal place of detention during the five hour interim cannot be said to constitute double jeopardy as we have heretofore considered it. Petitioner contends, however, that these cases are inapplicable here because correction of this sentence so as to make it lawful increases his punishment. *Cf. United States* v. *Benz*, 282 U. S. 304, 309. If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all. *Cf. Jordan* v. *United States*, 60 F. 2d 4, 6 with *Barrow* v. *United States*, 295 Fed. 949. This Court has rejected the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in pass-

[1] Compare Rule 45c, Rules of Criminal Procedure for the District Courts of the United States.

ing the sentence." *In re Bonner, supra* at 260. The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner. See *King* v. *United States*, 98 F. 2d 291, 296. In this case the court "only set aside what it had no authority to do and substituted directions required by the law to be done upon conviction of the offender." *In re Bonner, supra* at 260. It did not twice put petitioner in jeopardy for the same offense.[2] The sentence, as corrected, imposes a valid punishment for an offense instead of an invalid punishment for that offense.

Other contentions here do not merit our discussion. The judgment as to count one is affirmed. The judgment is reversed as to counts two and three.

It is so ordered.

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[2] In *Ex parte Lange*, 18 Wall. 163, relied on by petitioner here, the defendant had been sentenced to fine *and* imprisonment for violation of a statute which authorized a sentence only of fine *or* imprisonment. Since he had paid his fine and therefore suffered punishment under a valid sentence, it was held that his sentence had been "executed by full satisfaction of one of the alternative penalties of the law. . . ." *Murphy* v. *Massachusetts*, *supra* at 160. Therefore, Lange's plea, that the trial court could not correct the sentence without causing him to suffer double punishment, was sustained. *Cf. In re Bradley*, 318 U. S. 50. But here the petitioner had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine.

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1946.

Zachary Bozza, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 17, 1947.]

Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge dissenting as to the affirmance of the judgment on count one.

We are of the view that to convict one as an aider and abetter in engaging in or carrying on a distillery business with intent "to defraud" the United States of the tax on the distilled spirits, 53 Stat. 319, 26 U. S. C. § 2833 (a), evidence is necessary which shows that by some act of concealment he promoted the fraud, or by counsel and advice furthered the unlawful scheme, or in fact had some interest in the project.[1] See *United States* v. *Cooper*, 25 Fed. Cas. 627, 629; *United States* v. *Logan*, 26 Fed. Cas. 990, 992; *Seiden* v. *United States*, 16 F. 2d 197, 199; *Partson* v. *United States*, 20 F. 2d 127, 129; *Anderson* v. *United States*, 30 F. 2d 485, 487. Aiding and abetting in the illicit manufacture of liquor is one thing.[2] Aiding and

[1] Judge Learned Hand, after reviewing the various definitions of aiding and abetting, said: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it." *United States* v. *Peoni*, 100 F. (2d) 401, 402.

[2] Thus § 2833 (a) makes it an offense to "carry on the business of a distiller without having given bond as required by law." Section 2834 makes it unlawful to make or ferment mash, fit for distillation, in any building or on any premises other than an authorized distillery.

abetting in carrying on the business with intent to defraud the United States of a tax is quite a different matter, and requires a different test, if the two offenses are not to be blended. The evidence in the case and the instructions given the jury [a] seem to us inadequate to sustain a conviction under count one, charging Bozza with aiding and abetting in a tax fraud scheme.

In view of this conclusion, MR. JUSTICE RUTLEDGE reserves expression of opinion concerning the legality of the sentence.

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[a] ". . . if you find that he was merely an underling, serving at the beck and call of an employer and nothing more than that (sic) would not justify your finding him to be engaged in the business of a distiller. But if from the evidence you conclude logically that he aided and abetted in the carrying on of this business, then he would be chargeable as a principal. . . . Aiding and abetting is something more than merely committing an act which may have the effect of assisting or furthering a criminal transaction. Before a defendant can be held as an aider and abettor the government must prove beyond a reasonable doubt that he committed an act which furthered or assisted the criminal transaction, and at the time he committed the act he knew that a crime was in process of commission, and with that knowledge he acted with intent to aid and abet in the criminal transaction." While the above charges were requested by defendant, we nevertheless feel that the failure of the instructions to satisfy the standard we suggest is an error which we should notice. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.